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1964

JULY

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(ACT NO. 36 OF 1963)

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THE SUPREME COURT JOURNAL

II]

JULY

[1964

THE DIRECTIVE PRINCIPLES IN THE INDIAN CONSTITUTION

By

CHUNDRU APPA RAO, B.A., M.L., *Advocate, Hyderabad.*

INTRODUCTION

The functions of the State in modern times have changed markedly from those of the Nineteenth century. The hitherto Police State, whose functions confined to the preservation of law and order, defence and foreign relations, has given way to Welfare State or Social Service State, whose functions include the promotion and the preservation of the welfare of the community. It is continental practice¹, that a Constitution besides providing for the structure and the powers of the institutions of the Government and guaranteeing individual liberties, embodies injunctions directing Legislatures to enact social, economic and cultural reforms. The Constitution of India², contrary to the Anglo-American practice, provided for social, economic and cultural reforms in Part IV to achieve a social order in which social, economic and political justice shall inform all the institutions of the national life³. The purpose of this article is to show that such social, economic and cultural reforms or changes have been and will be brought about in every State by the sheer impact of social sciences and not by constitutional prescriptions.

COMMUNITY VERSUS LAW

State essentially is a congregation of individuals. It is natural that if an individual is left free he likes to have the way as he wills it, that is the way of living of his own choice. If society consists only of a single individual his will prevails, whereas in a society consisting of many individuals, the will of every individual cannot prevail. On the other hand, if every individual's will has free play it will produce chaos. So to maintain order in the society individual wills must be controlled. Law is founded to make a harmonious adjustment of the wills of the individuals. In other words, there must be found a will⁴, with whose reference the wills of individuals conform and act in accordance therewith. It may be assumed⁵, that the aggregate wills of all individuals in the society is the will of the community, which is the expression of the paramount or fundamental law of the community. This will of the community controls the will with whose reference individual wills conform.

1. Weimar Constitution of 1919 ; Soviet Constitution of 1936 ; The Constitution of French Republic, 1946 ; Czechoslovak Constitution of 1948.

2. Directive Principles of State Policy, Articles 36 to 52.

3. Article 38.

4. This 'will' is the will of the Government, which has to be accepted by the community over whom it rules.

5. It is ultimately the people which is the political sovereign. Other forms of Governments do exist only at the sufferance of the community, this political sovereign.

It is well known that "a State or political Society is an association of human beings established for the attainment of certain ends by certain means".⁶ The underlying idea of the ends or purposes of the State is to find a formula by which people in the State live happily. The means adopted to achieve these ends is by creating political organs which are invested with powers to regulate the common activity of the population for that purpose.

When society is organised into a State with political institutions, the will of the community came to be expressed and given effect to through those political institutions. In modern society the will of the community is embodied in the Constitution of the State. And this Constitution creates and confers the powers and prescribes the functions of the political institutions. Of these, the law-creating activity is assigned to the legislative body, whose powers and functions are determined by the Constitution. These are invariably exercised by the representatives of the people⁷, barring a few cases, where the form of direct democracy⁸, is in operation. Elections are conducted at regular intervals and the electorate has the opportunity of approving or disapproving the activity of the Legislatures by electing candidates whose policies are in accordance with general consensus of the population.

Thus the activity of the Legislature, which is mainly enactment of the body of laws, is regulated by the Constitution and also is influenced by the electorate or public opinion. Apart from the constitutional inhibitions, legal norms to get the force of law must receive the approval of the population of the State. This approval is manifested in what the jurists call, obedience to law.

THE CONCEPT OF WELFARE AND THE FUNCTION OF LAW.

"Human craving for regularity and legality is the foundation of society and its satisfaction a condition of welfare."⁹ Facts of life in the society appeared differently to the different social philosophers ; but it is the opinion of all that for a harmonious living in the society, there must be a code of social norms. Of course, there is no unanimity as to the contents of these social norms ; neither are they infallible for all time. State recognises only a few of them, which are the legal norms, for its enforcement. But "a body of laws represents in itself neither a social reality nor a social ideal".¹⁰ So political thinkers have suggested many theories, with reference to which the structure of the society will be created and the State power should be utilised and laws are to be made in accordance therewith. Broadly, they can be classified into three categories. One is non-interference by the State in the affairs of men and material except for the administration of the State and secondly the other extreme, complete control of everything in the community including men and material. The last category would be the mixture of these two, that is, there will be spheres where the State will have complete control, leaving the other spheres to the individual's freedom of activity. In all these the ideal would be a social order in which every individual will have an equitable share in the enjoyment of the rights and the wealth of the nation. Apart from the relative merits of these three categories, there must also be considered the political structure of the Government.¹¹ The basis of the State being essentially the will of the people, the political forces at work will always try for the democratisation of the political institutions. The first two categories will be opposed to the democratisation of the political structure of the State, whereas the third category can co-exist with democracy.¹²

6. *Salmond on Jurisprudence*, page 129.

7. To have a true representation of the population of electorate, many electoral formulas have evolved.

8. A certain number of people can join and initiate legislation, which is called initiative, to have a certain law passed under certain conditions.

9. *Law and Social Action : Selected Essays* by Alexandar H. Pekelis, page 21 : Edited by Milton R. Konvitz (Cornell University Press, Ithaca, N.Y. 1950).

10. *Law and Social Action (ibid)*, page 21.

11. It is natural that on the political plane also there will be progress.

12. See foot notes 16, 18 and 19 *infra*.

There is a wide gap between facts of life and the abstract standards of the social ideals. Law forms a link between these two. "The task of each legal system is to secure the conditions of social life as conceived and lived by the men of particular society at the particular time".¹³ This is achieved through the enactment of laws, whose function in the society is to create rights and liabilities and to afford a guarantee to such rights and liabilities. The boundaries of social activity is thus determined by the law, which serves well in all times. It is pointed out by Roscoe Pound that "until the world became crowded, it (law) served well to eliminate friction and to promote the widest discovery and utilisation of the natural resources of human existence."¹⁴ Thus the task was limited to its negative aspect of harmonising or equalising the wills of individuals, when the economic set-up of the society was based on the doctrine of *laissez faire*. On the other hand, "in a crowded world, whose resources had been exploited, a system of promoting the maximum of individual self-assertion had come to produce more friction than it relieved and to further rather than to eliminate waste",¹⁵ and the function of law changed to one of satisfaction of the economic wants of the people. Thus law represents the positive aspect of distributing the wealth of the nation equitably. In enacting a law a particular objective is sought to be achieved. So, when a law is enacted, the object or purpose for which that law is made is known beforehand. In other words, the purpose for which the law is enacted could be determined. In providing the contents of the law, the course of law is determined, which amounts to the shaping or re-shaping of the law. To achieve the welfare of the community laws can be enacted.

Of the three categories referred to above, the problem of re-shaping the law in a particular direction under the Government of the first category, will be meaningless, for laws exist mainly for the regulation of functions of the State and the pattern of life cannot be changed. The system of Government which can promote this category is termed Police State which is now outmoded¹⁶, and cannot exist for the reason that changes for the welfare of the community, it is felt, cannot be realised under this system. When "welfare is measured not only by the absolute amount of goods and services enjoyed by men but by their relative distribution as well"¹⁷, this category of Government cannot achieve them. State without interfering in the affairs of men and material cannot realise the welfare of the community and law cannot be used as an instrument to promote a new social order.

The second category is an ideal one in this respect. The State can steer the legislative powers for re-shaping of law. It can change the pattern of living and create a new social order which promotes the welfare of the community. The wealth of the nation can be used for the good of the community.¹⁸

In the last category, of course, to the extent of the sphere allotted to the State monopoly, the re-shaping of the law is no problem. But with respect to the other sphere, individual's freedom is assured, and the change of law will be in relation to the pressures of social life in the community.¹⁹ Public opinion will determine the course of the legislation.

TRANSITION OF THE STATE FROM POLICE STATE TO WELFARE STATE.

Originally, the main purpose for which State had been established was to maintain order in the society and to protect that order from forces of disruption from

13. The Province and Function of Law : Julius Stone (1950) (quoting Ihering), page 309.

14. An Introduction to the Philosophy of Law : Roscoe Pound (1955), page 40.

15. An Introduction to the Philosophy of Law (*ibid*), page 42.

16. Under this category comes what are called capitalist countries which have either to surrender or use the power of the State to suppress political democracy.

17. Law and Social Action: Alexander Pekelis, page 17.

18. To this category belong communist and totalitarian countries where a single party or individual rules the nation and opposition has no voice.

19. These are the democratic countries, where certain rights of the people, more especially those of the minorities, are secured by the Constitutions and the remaining rights are subject to the legislative power of the State,

within and without. Thus the main functions of the State were maintenance of law and order, administering justice, conducting the defence and foreign relations. With the establishment of the State on a firm basis, the endeavour of the people was directed to promoting civilization. The exploration of the human intellect brought social sciences into existence which in their turn brought more problems necessitating the State to assume more functions.

The welfare of the community is the ideal of every State and this depends on how law determines the rights and obligations of the individuals. Law being the foundation of the society must keep on changing as the functions of the State change. This transformation is achieved where law is adaptable to changing social and economic conditions by a process of evolution and where law is rigid by means of revolution. The flexibility or rigidity of law is in relation to the law-creating institution. The aim of the legislator should be the good of the community, that is, the social good. This aim depends on the social and economic background of the community, for, every individual is conditioned by the social and economic factors that surround him. So the good of the community changes according to the social and economic conditions prevailing at that time; and the "ideas of good are never absolute but relative always to a given economic (and social) environment".²⁰ The progress of civilisation brings changes in the social and economic set-up of the society.

Law must reflect the prevailing ideas of social good. The will of the Government, as a coercive force, must be utilised to achieve this social good. The changes in the concept of good if reflected also in the will of the Government, bring about the process of evolution. If the will of the Government refuses to recognise the change in the concept of public good, the fundamental law, that is the will of the community, will determine the will of the Government, which is the process of revolution.

DIRECTIVE PRINCIPLES OF STATE POLICY IN OUR CONSTITUTION.

The changes in law can be determined by determining the powers and functions of the law-creating body. As is shown, this body is controlled and directed essentially by two factors, the Constitution and the public opinion. It may now be asked what purpose is served by the inclusion of a chapter on Directive Principles in the Indian Constitution; whether a constitutional status is given or it is only to provide an incentive to public opinion. If constitutional status is given it may further be asked whether the norms so created provide for a positive action or for removing constitutional inhibitions.

Per se NOT BINDING.

In embodying the Directive Principles in the Constitution of India, the Constituent Assembly had given "certain directions to future legislatures and the future executives to show in what manner they are to exercise legislative and executive powers which they will have"²¹ in the Constitution. A certain amount of guarantee for the promotion of the welfare of the community is sought to be secured within the frame-work of constitutional absolutes. These relate to economic, social, health and political policies beneficial to the community. This aim is sought to be given effect to in the Constitution by prescribing the contents of legislation.

It may now be asked whether the original intention of the Constituent Assembly was to give to the provisions dealing with economic, social, health and political policies a status on par with other constitutional provisions like Fundamental Rights. One thing is clear that, Directive Principles are not *per se* operative. The objects therein are sought to be achieved by means of legislation. Till legislation is passed embodying these directives, they have no force by themselves nor will they have any effect on the activity of the community. It is supposed that by imposing a duty on the State as defined by Article 36 read with Article 12, every organ of the State is

20. State in Theory and Practice: Harold J. Laski, page 187.

21. Constituent Assembly Debates : Dr. B. R. Ambedkar, page 476.

bound to give effect to them. In that sense, the three organs of the State, the Legislature, the Executive and the Judiciary are supposed to give effect to them.

It is evident that Judiciary is not comprehended within the definition of the State, and Article 36 specifically provides not to enforce these directives by judicial process. So, the ultimate standard of judicial review by the judiciary, if legislation is made to give effect to these directives, is the other provisions in the Constitution.²² That is also clear, since these directives prescribe only standards of policy and not ultimate criteria of legal validity. Besides, in a democratic set-up, judiciary is not the proper forum where the economic, social and political policies of the country can be agitated.

NOT BINDING ON THE LEGISLATURE.²³

It may now be asked whether the confidence left in the Legislative and Executive organs to carry into effect the provisions in the Directive Principles is well founded.

These Directive Principles impose duties on the Legislative and Executive organs to carry into effect the ideals set in there, which can be done by means of legislation. If legislation is made, it cannot override the constitutional provisions, especially those dealing with Fundamental Rights. In the final analysis, the legislation giving effect to these directives are on par with ordinary legislation subject to the constitutional inhibitions. They are valid as long as they do not contravene the provisions of the Constitution. In a parliamentary democracy, the Government which is the legislative leader is committed to put in force certain policies approved by the people.

The underlying philosophy of the Directive Principles are varied. According to the framers of the Constitution, they embody in themselves the different forms of socio-economic structure of the society, so that the future Legislatures and Executives can choose a particular form of economic democracy of their choice.²⁴ The forms of economic democracy, namely, individualism, socialism and communism, on which the Chapter on Directive Principles in the Constitution is based, could be achieved by the party in power by implementing its Election Manifesto through legislation, in which case the Chapter on Directive Principles is a superfluity.

Further, there are no sanctions against non-performance of the duties imposed by these directives. Besides, these duties are imposed to carry into effect the directives at the option of the respective bodies. Apart from the legal nature of the duty to be carried out at its option, the violation of the duty will not make the action illegal but only call for sanction, if there is one.

DUTIES AND CONSTITUTIONAL INHIBITIONS.

The competency of the legislative body is not synonymous with the duty imposed on it. The legality of the acts done by the body depends on whether that body has the power to do those acts, but not whether that body is obliged to do them. On the other hand, non-fulfilment of an obligation will call forth application of sanctions. When the body has no power to act, the action done by it would be invalid, but the imposition of a duty will not cure the invalidity. By imposing a duty, constitutional inhibitions cannot be removed.

DIRECTIVE PRINCIPLES AND PUBLIC OPINION.

It is true, in the ultimate analysis, the changes in the legal institutions depend on the contents of economic, social and political forces in the society and the nature and the position of the State organ giving effect to them. By the inclusion of the Directive Principles in the Constitution, the necessary initiative to bring about the changes in the society is provided for. Also by

22. Vide 'Fundamental Rights *vis-a-vis* Directive Principles in Indian Constitution', (1951) 2 S.C.J. (Journal) 11 : (1951) 2 An.W.R. (Journal) 17.

23. Vide 'Juridical Analysis of the Directive Principles of State Policy in general' : (1951) 2 S.C.J. (Journal) 83 : (1951) 2 An.W.R. (Journal) 33.

24. Constituent Assembly Debates : Dr. B. R. Ambedkar, page 494.

imposing these as duties on the legislative bodies constitutional inhibitions are sought to be removed. As is shown these two purposes are not well served.

It is a trite to observe that for the law or legal norms to receive obedience, it must accord with the prevailing ideas of justice, morality and expediency, which are determined by economic, social and political factors. Conversely the legal norms which are not in accordance with the sense of justice, morality and expediency conditioned by the economic, social and political pressures, will not receive obedience from the population. In a democratic country it is impossible to impose a law on a hostile community.²⁵ The process of periodical checks by the electorate, in practice establish a constant and necessary accord between law and generally prevailing beliefs and sentiments of the community and its changing kinds. Without some general concurrence of law and moves (morality in the sense of moves) a community will not possess or retain what Austin called the habit of obedience, lacking which sooner or later law will cease to maintain its binding force.¹

On the other hand, there will be compelling economic and social factors which necessarily result in legal action². The same inter-action between the public opinion and the law-creating body provides the stimulus. The sources of such stimulus would be the "slowly growing pressure of changed pattern and norms of social life" or "a demand for a re-distribution of natural resources"³.

In the opinion of the framers of the Constitution⁴, the Directive Principles embody the three forms of economic democracies of individualism, socialism and communism, which the future legislative and executive organs can adopt. In the view that these three forms of economic democracies exhaust the possible socio-economic structures, the directive principles will not provide any incentive to the community to bring about the changes.

OTHER CONSTITUTIONS

There are mainly two types of political systems of Governments, democratic and totalitarian, to which all the Governments in the world can be resolved with a smaller degree of variations. Even the three categories, which have been referred to earlier⁵, can be resolved into these two political types. In a democratic system of Government, the first two categories, that is, a system of Government where the State will not interfere in the affairs of men and material excepting for the administration of State functions and the other complete control by the State, cannot survive. Whereas the third category, where the State and individual's freedom are guaranteed in the different spheres, can be realised only in a democratic system of Government. In the first category, the State will either remain as such and becomes more or less totalitarian or it becomes democratic and destroys that system. In the second category, the system of Government is only a totalitarian one.

In both the systems of Governments changes in economic and social patterns of the life of the community are discernible and the problems have been tackled by means of law to preserve and promote the good of the community.

Apart from some in the continent, the Constitutions of the countries following Anglo-American jurisprudence of legal institutions do not have the injunctions like

25. The problem of prohibition may be studied in this connection. In many of the countries this problem has been tackled by means of law but had to be withdrawn by repealing them, as the consensus of the general public proved to be not in favour of imposing prohibition. However much socially and also on grounds of health the policy of prohibiting the consumption of liquor is sound and laudable, that policy is not in accordance with the prevailing beliefs and so prohibition laws did and will not have their hold on the population.

1. Aspects of Justice : C. K. Allen.

2. A study of the institution of private property as regulated by law at different ages provide a good example. The restrictions imposed in the 20th century on the dual rights of acquisition and the enjoyment of property would be shocking to an individual in the 19th century.

3. Law in Changing Society : W. Friedmann (Seven & Sons, Ltd., London, 1959), page 22.

4. Constituent Assembly Debates : Dr. B. R. Ambedkar, page 494.

5. *Supra*.

the Directive Principles of the Indian Constitution. The Constitutions of the United States of America, United Kingdom and Canada, on the basis of which the Constitution of India is drawn, do not provide these injunctions to bring about the changes for the welfare of the community. But the study of the constitutional laws and the development of the legal institutions in those countries reveal how the shaping of law is taking place to create the required social order.

In the United States it is supposed and for sometime accepted, that the Federal Government has no police power, which is defined as "the general power to pass regulatory laws for the protection of the health, morals, safety, good order and the general welfare of the community"⁶. But in recent years the power to achieve the same social objectives which the police power could achieve, has come into existence through the use by Congress of certain of its powers. By this somewhat indirect method the Congress has come to exercise control over an ever-increasing social and economic legislation which is popularly known as the New Deal Legislation, passed to solve the social and economic problems.

The position with reference to the United Kingdom is peculiar. Though in the sense of a written Constitution, United Kingdom does not have one, no law prescribes that the Parliament should pass laws to achieve a required social order. But the statute book contains many laws which go to shape social and economic objectives. The British North America Act (1867) also does not provide the contents for future legislation, but the study of the New Deal Legislation discloses that laws are made to achieve some social and economic objectives either to counteract or to create a new order.

In a democracy the interplay between social opinion and the law-moulding activities of the State is more obvious and articulate. Public opinion on vital social issues constantly expresses itself not only through the elected representatives in the legislative assemblies but through public discussion in press, radio, public lectures, pressure groups and on a more sophisticated level through scientific and professional associations, universities and a multitude of other channels.⁷ As is shown earlier, the pressure of public opinion will ultimately result in legal action if the legislative bodies are already competent or, by amending the Constitution to provide that competency if they are not.

In the case of the totalitarian States, they have positive advantage over the democratic systems in creating the required social order in the community. "A totalitarian Government can indeed use its monopoly of the law-making and executive powers for the re-shaping of law in disregard of the democratic process of public opinion, to a far greater extent than other systems, but it is limited by the need to secure at least the acquiescence and where it produces an educated minority, the willing acceptance of its law". It is, of course, true in many of the Constitutions of these countries certain provisions prescribing the positive content of the future legislations are to be found, but it is a known fact that in these countries legal provisions have little value. But in all these countries the progress towards a particular social order by means of legal action is marked.

IN INDIA.

Even in India, the statute book contains many laws which are enacted to achieve social and economic objectives. The so-called laws of Zamindari Abolition may be cited as providing for drastic and revolutionary changes in the institution of property. But, strictly, they are no innovations based on the Directive Principles, for, they have been passed before the Constitution of India came into force. Nor could they be saved by these provisions of the Directive Principles but for the amendments to the Constitution. Since they are in accord with the prevailing concepts of the rights over the property, these laws have come to be enacted.

6. Leading Constitutional Decisions : Robert Eugene Cushman (1955), page 330.

7. Law in a Changing Society : W. Friedmann, page 10.

Similarly, judiciary being an organ of the State, it cannot ignore the trend of social and economic evolution in the society. The Courts, when confronted with the suits before it, have to apply the rules of law and interpret them with reference to available social and economic conditions. Resort by the Courts to social sciences for extra-legal guidance to shape the reality of law can be proved in the decisions. While law remains an abstract formula, the necessity to administer justice finds the law changing according to the needs of the times. Where the law changes in the process of rendering the decisions, judiciary plays the role of promoter of social and economic progress.

The doctrines of agricultural economy and the cattle wealth in the economic set-up were considered in determining the rights of the citizens to carry on the trade of butchers.⁸ The consideration of economic and social conditions of the particular group was necessary to determine the living wage to evolve a system of industrial harmony of journalists⁹, and of mill workers¹⁰. The creative nature of the judicial function can be seen when the Court observed that "a factory or an industrial unit which cannot afford to pay the minimum wage to its employees cannot be encouraged to survive and it is a drag on the social and economic structure of the country."¹¹

Where the judicial discretion is possible in the interpretation of such words as "reasonable restrictions" in Article 19 or "public purpose" in Article 31, the weight of judicial opinion will swerve towards welfare jurisprudence.

CONCLUSION.

In a democratic form of Government, the changes in law to achieve social and economic progress will be determined by public opinion. The pattern of life in the society determines the social and economic pressures which provide the incentive to the public opinion. The impact of social sciences brings changes in those pressures and the concept of good which is relative to those environments also changes. This is inevitable in every country. The Chapter on the Directive Principles in the Constitution of India, which are neither binding on, nor providing an incentive to the law-creating bodies or the general public, are unnecessary provisions in a legal document.

8. *M. H. Quareshi v. State of Bihar*, (1958) S.C.J. 975 : A.I.R. 1958 S.C. 731.

9. *Express Newspapers, Ltd. v. Union of India*, (1958) S.C.J. 1113 : A.I.R. 1958 S.C. 578.

10. *National Carbon Co., Ltd. v. M. N. Gani*, A.I.R. 1957 Cal. 500.

11. *Edward Mills Co., Ltd. v. State of Ajmer*, A.I.R. 1953 Ajmer 65.

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II]

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[1964

NOTES OF RECENT CASES.

[SUPREME COURT.]

K. Subba Rao and J. R. Mudholkar, JJ.
3rd February, 1964.

Mrs. M. N. Clubwala v.
Fida Hussain Saheb.
C.A. No. 151 of 1963.

Madras City Municipal Act (IV of 1919), section 303—Private market owner and stall-holder—Nature of relation between—Landlord and tenant or licensor and licensee—Meaning of word rent—Easement Act (V of 1882), section 62 (c).

The mere necessity of giving a notice to a licensee requiring him to vacate the licensed premises would not indicate that the transaction was a lease. Indeed, section 62 (c) of the Indian Easements Act, 1882 itself provides that a licence is deemed to be revoked where it has been either granted for a limited period or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled. In the agreements in question the requirement of a notice is a condition and if that condition is fulfilled the licence will be deemed to be revoked under section 62. It would seem that it is this particular requirement in the agreements which has gone a long way to influence the High Court's finding that the transaction was a lease. Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement. In the absence, however, of a formal document the intention of the parties must be inferred from the circumstances and conduct of the parties. Where the terms of the document evidencing the agreement between the parties are not clear the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties. The documents relied upon being merely agreements executed unilaterally by the stall-holders in a private market in favour of the landlords they cannot be said to be formal agreements between the parties. One must therefore look at the surrounding circumstances.

In the circumstances of the instant case the intention of the parties was to bring into existence merely a licence and not a lease and the word 'rent' was used loosely for 'fee'.

S. T. Desai, Senior Advocate (*R. Ganapathy Iyer*, Advocate, with him), for Appellants.

R. Gopalakrishnan, Advocate, for Respondents Nos. 1 to 6.

G.R.

Appeal allowed.

[SUPREME COURT.]

K. Subba Rao and J.R. Mudholkar, JJ.
5th February, 1964.

Gurdatta Mal v. State of U.P.
Cr. A. No. 180 of 1961.

Penal Code (XLV of 1860), section 302 read with section 34—Scope—Sections 99 and 103 —When attracted.

Where the accused with the common intention to kill the deceased, armed themselves with guns and spears and attacked the deceased from a close range immediately after coming to the field and killed them they were certainly guilty under section 302, read with section 34, of the Indian Penal Code.

In the absence of any reasonable apprehension on the part of the accused that they would be killed or hurt by the deceased, the High Court was certainly right in holding that the provisions of section 103 of the Indian Penal Code were not attracted.

Section 103 of the Indian Penal Code is subject to section 99 thereof. Under section 99, there is no right of private defence in cases in which there is time to have recourse to the protection of public authorities, and the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Jai Gopal Sethi, Senior Advocate (R. L. Kohli, Advocate, with him), for Appellants.

A. N. Mulla, Senior Advocate (Atiqur Rehman and C. P. Lal, Advocates, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., K. N. Wanchoo,
K. C. Das Gupta, J. C. Shah and
N. Rajagopala Ayyangar, JJ.
5th February, 1964.

Brij Mohan Singh v.
Priya Brat Narain Sinha.
C.A. No. 9 of 1964.

Representation of People Act (XLI of 1951), sections 7 (d) and 123—Candidate below 25 years of age—Burden of proof—Article 137 of the Constitution of India (1950)—Evidence Act (I of 1872), section 35.

The burden of proving that a candidate's age was below 25 years on the date of his nomination was on the election petitioner.

As the petitioner was unable "to prove the publication of an impugned pamphlet Exhibit-10 by the candidate or his agent or by any other person with the consent of the candidate or his election agent, the conclusion of the Election Tribunal that the commission of any corrupt practice by the candidate under section 123 (4) of the Representation of the People Act has not been proved and the contrary view taken by the High Court is wrong".

C. B. Agarwala, Senior Advocate (L. M. Sarma and D. N. Mukherjee, Advocates, with him), for Appellant.

Sarjoo Prasad, Senior Advocate (K. K. Sinha, Advocate, with him), for Respondent No. 1.

G.R.

Appeal allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., A. K. Sarkar,
K. N. Wanchoo, K. G. Das Gupta
and N. Rajagopala Ayyangar, JJ.
6th February, 1964.

State of U.P. v.
Kartar Singh.
Cr. A. No. 164 of 1962.

Prevention of Food Adulteration Act (XXXVII of 1954), section 7 read with section 16 (1) (a) (i)—Minimum standard prescribed by the Rules—Validity—Burden of proof.

"Except a principle which the Court deduced from the Rules themselves there was no material before the Court that the minimum standard prescribed for Uttar Pradesh was, defective in any respect. The approach adopted by the learned Judges in *State v. Malik Ram*, A.I.R. 1962 All. 156, appears to us to be a reversal of the well-recognised principle that it is for those who challenge the constitutionality of a statute or a statutory rule to allege and prove the grounds of invalidity and the adoption of the contrary rule that when a party makes such a challenge it is for those who seek to support it to sustain it by positive evidence of its reasonableness and legality. The Court evolved from a reading of the Rules a principle that the standards vary with the elevation of the place, without having before it any materials for such a conclusion save what it considered was the rationale underlying the division into zones. As already explained, even in Himachal Pradesh the elevation of every place is not the same and there are areas which are higher than others and so the test adopted does not even satisfy logic. We do not consider that the Court was justified in practically legislating and laying down what the Rules should be rather than give effect to the law by adherence to the Rules as framed."

O. P. Rana and G. P. Lal, Advocates, for Appellant.

Harnam Singh Chadda and Harbans Singh, Advocates, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

K. Subba Rao and J. R. Mudholkar, JJ.
11th February, 1964.

K. J. Nathan v. S. V. Maruthi Rao.
C.A. No. 407 of 1962.

Transfer of Property Act (IV of 1882), section 58—Mortgage by deposit of title-deeds—Constructive delivery of documents—Sufficiency.

If the plaintiff physically handed over the title deeds to the 1st defendant and the 1st defendant immediately handed over the same to the plaintiff with intention to mortgage them, it is conceded that a valid mortgage was created. To insist upon such a formality is to ignore the substance for the form. When the principal tells the agent "from to-day you hold my title deeds as security", in substance there is a physical delivery. For convenience of reference such a delivery can be described as constructive delivery of title-deeds. The law recognizes such a constructive delivery.

If the mortgage by deposit of title-deeds was thus effected a subsequent mortgage deed in favour of another cannot have priority.

R. Ramamurthy Aiyar, T. S. Rangarajan and R. Gopalakrishnan, Advocates, for Appellant.

V. S. Venkataraman, M. R. Krishna Pillai and M. S. K. Iyengar, Advocates, for Respondent No. 3.

G.R.

Order accordingly.

[SUPREME COURT.]

*P. B. Gajendragadkar, C. J., K. N. Wanchoo,
K. C. Das Gupta, J. C. Shah and
N. Rajagopala Ayyangar, JJ.*
12th February, 1964.

*Jagdev Singh Sidhanti v.
Pratap Singh Daulta.*

C.A. No. 936 of 1963.

Representation of the People Act (XLI of 1951), section 123—Language question—Propaganda—If corrupt practice.

Political speeches espousing the cause of a particular language and making promises or asking the people to protest against the Government of the day in respect of its language policy is not a corrupt practice within the description of corrupt practice under section 123 (3) of the Representation of the People Act.

Purshotham Trikamdas, Senior Advocate (Rajinder Nath Mittal, R. B. Datar, V. Kumar, B. P. Singh and Naunit Lal, Advocates, with him), for Appellant.

G. S. Pathak, Senior Advocate (Bawa Shiv Charan Singh, Hardev Singh, Rajendra Dhawan, Dr. Anand Prakash and T. Kumar, Advocates, with him), for Respondent No. 1.

G.R.

Appeal allowed.

[SUPREME COURT.]

*P. B. Gajendragadkar, C. J., K. N. Wanchoo,
K. C. Das Gupta, J. C. Shah and
N. Rajagopala Ayyangar, JJ.*
14th February, 1964.

R. L. Arora v.

State of U.P.

Petition No. 137 of 1962.

Land Acquisition Act (I of 1894), sections 40 and 41 amended by (XXXI of 1962)—Vires—Scope—Articles 14, 19 and 31 of the Constitution.

By majority.—Section 40. clause (aa) of Land Acquisition Act as amended by Act (XXXI of 1962) does not permit acquisition of land for construction of some building or work for a company engaged or to be engaged in an industry or work, which is for a public purpose unless the building or work for which the land is acquired also subserve the public purpose of the industry or work in which the company is engaged. If that is the true construction of clause (aa) it cannot be said to contravene Article 31 (3) of the Constitution for the public purpose required therein is present where land is required for the construction of a building or work which must subserve the public purpose of the industry or work in which a company is engaged or is about to be engaged. Nor can it be said that the provision is hit by Article 19 (1) (f), for it would be a reasonable restriction on the right to hold property. The clause so interpreted is not unconstitutional. The amendments in section 41, Land Acquisition Act are only consequential to the insertion of clause (aa) in section 40 (1) and would therefore be equally valid and constitutional.

There is a clear classification between a public company and a Government Company on the one hand and a private company and an individual on the other, which has reasonable nexus with the objects to be achieved under the law. The intention of the Legislature clearly is that private individuals and private companies which really consist of a few private individuals banded together should not have the advantage of acquiring land even though they may be intending to engage in some industry or work which may be for a public purpose inasmuch as the enrichment consequent on such work goes to private individuals or to a group of them who have formed themselves into a private company. Public companies on the other hand are broad based and Government companies are really in a sense no different from Government though for convenience of administration a Government company may be formed, which thus becomes a separate legal entity. Thus in one case the acquisition results in private enrichment while in the other it is the public which gains in every way. Therefore a distinction in the matter of acquisition of land between public companies and Government companies on the one hand and private individuals and private companies on the other is justified, considering the object behind clause (aa) as introduced into the Act. The contention that it is discriminatory must therefore also fail.

G. B. Agarwala, Senior Advocate (*Naunit Lal*, Advocate, with him), for Petitioner.

M. C. Setalvad, Senior Advocate (*C. P. Lal*, Advocate, with him), for Respondent No. 1.

C. K. Daphtary, Attorney-General for India, and *N. S. Bindra*, Senior Advocate (*R. H. Dhebar*, Advocate, with them), for Respondent No. 2.

M. C. Setalvad, Senior Advocate (*M. S. Devendra Swarup* and *J. P. Goyal*, Advocates, with him), for Respondent No. 3.

I. M. Nanavati, Advocate and *O. C. Mathur*, *J. B. Dadachanji* and *Ravinder Narain*, Advocates, of *M/s. J. B. Dadachanji & Co.*, for Intervener No. 1.

Rajani Patel and *I. N. Shroff*, Advocates for Intervener No. 2.

G.R.

Petition dismissed.

[SUPREME COURT.]

M. Hidayatullah and
Raghubar Dayal, JJ.
14th February, 1964.

S. M. Karim alias Tamanna Saheb v.
Mst. Bibi Sakina.
C.A. No. 647 of 1962.

Civil Procedure Code (V of 1908), section 66—Benami—Bar of claim based on—Possession—A plea not raised in the plaint.

The appellant's claim based upon the benami nature of the transaction cannot stand because section 66 of the Code of Civil Procedure bars it.

The words of the second sub-section refer to the claims of creditors and not to the claims of transferees. The latter are dealt with in the first sub-section. An alternative case based on possession after purchase is not sustainable without a proper plea.

S. P. Varma, Advocate, for Appellant.

S. P. Sinha, Senior Advocate (*Shahzadi Mohiuddin* and *Shaukat Hussain*, Advocates, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao and
J. R. Mudholkar, JJ.
17th February, 1964.

Ramchandra Rambux v.
Champabai.
C.A. No. 758 of 1963.

Will—Will prepared in circumstances arousing suspicion—Duty of propounder.

In all cases in which a will is prepared under circumstances which arouse the suspicion of the Court that it does not express the mind of the testator, it is for the propounder of the will to remove that suspicion.

J. B. Dadachanji, *Ravinder Narain* and *O. C. Mathur*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Appellant.

Girish Chandra and *Sardar Bahadur*, Advocates, for Respondents Nos. 1, 2 (i) to 2 (iv), 3 and 4.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., *K. N. Wanchoo*,
J. C. Shah, *N. Rajagopala Aiyangar* and
S. M. Sikri, JJ.
26th February, 1964.

B. K. Sarkar v. Eagle
Rolling Mills, Ltd.
C.As. Nos. 721 to 723 of 1962.

Employees' State Insurance Act (XXXIV of 1948), section 1 (3)—Validity.

Section 1 (3) of the Employees' State Insurance Act is constitutionally valid. The section provides for the coming into force on such date or dates as the Centra.

Government may by notification in the Official Gazette appoint, and different dates may be appointed for different provisions of the Act and for different States or different parts thereof. Such delegation was not unwarranted and unconstitutional and it did not exceed the limits of permissible delegation. Section 1 (3) of the Act is not shown to be constitutionally invalid.

N. C. Chatterjee, Senior Advocate (*Raj Behari Singh* and *Udai Pratap Singh*, Advocates, with him), for Appellants (In all the Appeals).

B. P. Singh, *N. P. Singh* and *I. N. Shroff*, Advocates, for Respondent No. 1 (In all the Appeals).

C. K. Daphtary, Attorney-General of India and *N. S. Bindra*, Senior Advocate (*V. D. Mahajan* and *B. R. G. K. Achar*, Advocates, with them), for Respondents Nos. 2 and 3 (In all the Appeals).

G.R.

Appeals dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C. J., *K. N. Wanchoo*,

J. C. Shah, *N. Rajagopala Ayyangar* and

S. M. Sikri, JJ.

26th February, 1964.

State of Rajasthan v.

Mukan Chand.

C.A. No. 507 of 1961.

Rajasthan Jagirdars' Debt Reduction Act (IX of 1957), sections 2 (e), 5 and 7 (2)—Articles 14 and 31 of the Constitution.

The impugned part of section 2 (e) of Rajasthan Jagirdars' Debt Reduction Act infringes Article 14 of the Constitution. It is now well-settled that in order to pass the test of permissible classification, two conditions must be fulfilled namely, (1) that the classification must be founded on an intelligible differentiation which distinguishes persons or things that are to be put together from others left out of the group, and (2) that the differentia must have a rational relationship to the object sought to be achieved by the statute in question. The object sought to be achieved by the impugned Act was to reduce the debts secured on jagir lands which had been resumed under the provisions of the Rajasthan Land Reforms and Resumption of Jagirs Act. The Jagirdar's capacity to pay debts had been reduced by the resumption of his lands and the object of the Act was to ameliorate his condition. The fact that the debts are owed to a Government or local authority or other bodies mentioned in the impugned part of section 2 (e) has no rational relationship with the object sought to be achieved by the Act. Further, no intelligible principle underlies the exempted categories of debts. The reason why a debt advanced on behalf of a person by the Court of Wards is clubbed with a debt due to a State or a scheduled bank and why a debt due to a non-scheduled bank is not excluded from the purview of the Act is not discernible.

Section 7 (2), is valid as it imposes reasonable restrictions, in the interests of general public, on the rights of a secured creditor. A secured creditor, when he advanced money on the security of jagir property, primarily looked to that property for the realisation of his dues. Further, this sub-section has been designed with the object of rehabilitating a jagirdar whose jagir properties have been taken over by the State for a public purpose at a low valuation. If this provision was not made, the jagirdar would find it difficult to start life afresh and look to other avocations, for not only his existing non-jagir property but his future income and acquired properties would be liable to attachment and sale for the purpose of satisfying the demands of such secured creditors. Accordingly, we hold that section 7 (2) imposes reasonable restrictions in the interest of general public.

S. K. Kapur, Senior Advocate (*B. R. G. K. Achar*, Advocate, with him), for Appellant.

Respondent not represented.

G.R.

Appeal partly allowed.

[SUPREME COURT.]

*K. Subba Rao, Raghubar Dayal,
and J. R. Mudholkar, JJ.*
26th February, 1964.

*Shiv Prasad Chuni Lal Jain v.
State of Maharashtra.*
Cr. As. Nos. 150 and 185 of 1961.

*Penal Code (XLV of 1860), section 467 read with sections 34 and 471 and
section 467 read with section 109—Scope.*

In *Jaikrishnadas Manohardas Desai v. The State of Bombay*, (1960) 3 S.C.R. 319
Shreekantiah Ramayya Munnipalli v. The State of Bombay, (1955) 1 S.C.R. 1177, came
up for consideration and was distinguished, on facts. In that case, the two accused
who were directors of a company, were convicted of an offence under section 409
read with section 34, Indian Penal Code for committing criminal breach of trust
with respect to certain cloth supplied to them. It was alleged that one of the accused
was not working at that factory during the period when the goods must have been
removed and that therefore he could not be made liable for the misappropriation of
the goods by taking recourse to the provisions of section 34, Indian Penal Code.

Accused No. 1, in the present case, alone did the various acts on 18th February.
1959, which constituted the offences of which he was convicted. Accused Nos. 2
and 3 took no part in the actual commission of those acts. Whatever they might
have done prior to the doing of those acts, did not form an ingredient of the offences
committed by accused No. 1. They cannot be said to have participated in the com-
mission of the criminal act which amounted to those various offences. They cannot
be therefore held liable, by virtue of section 34, Indian Penal Code, for the acts
committed by accused No. 1 alone, even if those acts had been committed in further-
ance of the common intention of all the three accused. The result, therefore, is
that the conviction of the appellants, viz., accused Nos. 2 and 3, for the variout
offences read with section 34, Indian Penal Code is to be set aside.

We therefore allow the appeal of Pyare Lal and acquit him of the offences he
was convicted of. We dismiss the appeal of accused No. 3, Shiv Prasad Chunilal
Jain, but alter his conviction for the various offences read with section 34, Indian
Penal Code to those offences read with section 109, Indian Penal Code, and maintain
the sentences.

S. Mohan Kumaramangalam, Senior Advocate (*R. K. Garg* and *M. K. Ramamurthi*
Advocates of *M/s. Ramamurthi & Co.*, Advocates, with him), for Appellant
(In CrI. A. No. 150 of 1961).

B. M. Mistry, Advocate and *Ravinder Narain* and *J. B. Dadachanji*, Advocates
of *M/s. J. B. Dadachanji & Co.*, Advocates, for Appellant (In CrI. A. No. 185 of 1961).

B. K. Khanna, *B. R. G. K. Achar* and *R. H. Dhebar*, Advocates, for Respondent
(In both the Appeals).

G.R.

————— *Criminal Appeal No. 185 of 1961*
allowed and Criminal Appeal No. 150
of 1961 dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, C. J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar and
S. M. Sikri, JJ.*

3rd March, 1964.

*State of Madras v.
D. Namasivaya Mudaliar.
Neyveli Lignite Corporation, etc.*
(Interveners).

C.As. Nos. 6 to 12 of 1963.

*Madras Lignite (Acquisition of Land) Act (XI of 1953)—Land Acquisition Act (I of
1894)—Article 31 of the Constitution of India (1950)—Constitution (Fourth Amendment)
Act, 1955.*

It is a matter of common knowledge that since the termination of hostilities in
the last World War there has been an upward tendency in land values resulting in
appreciation in some areas many times the original value of lands. No attempt
has been made by the State to prove that appreciation in the market value of lands in

the area since April, 1947 was solely attributable to a scheme of land acquisition of lignite-bearing lands. To deny to the owner of the land compensation at rates which justly indemnify him for his loss by awarding him compensation at rates prevailing ten years before the date on which the notification under section 4 (1) was issued amounts in the circumstances to a flagrant infringement of the fundamental right of the owner of the land under Article 31 (2) as it stood when the Act was enacted.

The validity of the provisions relating to fixation of compensation had to be adjudged in the light of the extent of the constitutional protection guaranteed at the date when the Act was brought into operation, and any restriction of the constitutional protection by subsequent amendment of Article 31 (2) which has not been given retrospective effect, must be entirely ignored.

A. Ranganadham Chetty, Senior Advocate (*A. V. Rangan*, Advocate, with him), for Appellants (In all the Appeals).

R. Gopalakrishnan, Advocate, for Respondent (In C.A. No. 11 of 1963).

S. V. Gupte, Additional Solicitor-General of India (*R. H. Dhebar*, Advocate, with him), for Interveners Nos. 1 and 2.

M. C. Setalvad and *N. S. Bindra*, Senior Advocates (*R. H. Dhebar*, Advocate, with them), for Intervener No. 3.

G.R.

Appeals dismissed.

[SUPREME COURT.]

K. Subba Rao, *K. C. Das Gupta* and
Raghubar Dayal, JJ.
3rd March, 1964.

Matiullah Sheikh v.
State of West Bengal.
Cr.A. No. 111 of 1961.

Penal Code (XLV of 1860)—sections 449 and 307/34—Scope.

Higher punishment is prescribed where house trespass is committed "in order to" the commission of other offences. An examination of sections 449, 450, 451, 454 and 457 of the Penal Code shows that the penalty prescribed has been graded according to the nature of the offence "in order to" the commission of which house trespass is committed. It is quite clear that these punishments for house trespass are prescribed quite independent of the question whether the offence "in order to" the commission of which the house trespass was committed has been actually committed or not. In our opinion there can be no doubt that the words "in order to" have been used to mean "with the purpose of". If the purpose in committing the house trespass is the commission of an offence punishable with death the house trespass becomes punishable under section 449 of the Indian Penal Code. If the purpose in committing the house trespass is the commission of an offence punishable with imprisonment for life the house trespass is punishable under section 450 of the Indian Penal Code. Similarly, sections 451, 454 and 457 will apply if the house trespass or lurking house trespass, or lurking house trespass by night or house breaking by night are committed for the purpose of the offence indicated in those sections. Whether or not the purpose was actually accomplished is quite irrelevant in these cases. Accordingly the fact that the murder was not actually committed in the course of the house trespass will not affect the applicability of section 449 of the Indian Penal Code.

D. N. Mukherjee, Advocate, for Appellants.

P. K. Chakravarty, Advocate for *P. K. Bose*, Advocate, for Respondent.

G.R.

Appeal dismissed.

The Supreme Court Journal

II]

JULY

[1964

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA
AND J. C. SHAH, JJ.

The Hindustan Times, Ltd., New Delhi

.. Appellant*

v.

Their Workmen

.. Respondents.

Industrial Disputes—Revision of wage structure—Principles—Adjustment—Factors—Interim arrangement pending final settlement of dispute—Need to adhere to the agreement—Leave Rules—Employees' State Insurance Act, 1948—Benefit under, if affects leave rules—Applicability of Leave Rules under Delhi Shops and Establishment Act, 1954 to all workmen—Gratuity—Workman dismissed for misconduct—Deprivation of gratuity—Not proper—Retirement age—Fixation by the Tribunal—Principles.

Industrial Disputes Act (XIV of 1947), section 17-A—Award—Date of coming into operation—Principles

In fixing the wage structure this Court has repeatedly emphasised the need of considering the problem on an industry-cum-region basis, and of giving careful consideration to the ability of the industry to pay.

Where in the matter of revision of wage scales the proper principles have been applied by the Tribunal, it is not the practice of the Supreme Court to interfere, ordinarily, with details of this nature when exercising its special jurisdiction under Article 136 of the Constitution.

What adjustment should be given is to be decided when fixing wage scales whether for the first time or in place of an old existing scale has to be decided by industrial adjudication after consideration of all the circumstances of the case. It may well be true that in the absence of any special circumstances any adjustment of the nature as allowed in this case by allowing special increment in the new scale on the basis of service already rendered may not be appropriate.

The Tribunal took into consideration in deciding the question of adjustment the fact that it had been extremely cautious as regards increasing the old wage scales. Apparently, it thought that it would be fair to give some relief to the existing employees by means of such increase by way of adjustment while at the same time not burdening the employer with higher rates of wages for new incumbents.

In these circumstances, there is no justification for interfering with the directions given by the Tribunal in the matter of adjustments.

While it is true that industrial adjudication can and often has to modify existing contracts between an employer and its workmen, there can be no justification for modification of an agreement pending final settlement of a dispute. Such a direction that the solemn words of the workmen's representatives that interim relief which may be given will be adjusted against the relief finally given need not be complied with, is not only unfair to the employer but is also not calculated to serve the best interests of the workmen themselves. For one thing, an order of this nature in one case by a Tribunal that such an undertaking need not be carried out is likely to hamper interim settlements generally; it is also not desirable that workmen should be encouraged to treat their undertakings as of no value. Industrial adjudication must be careful not to encourage bad faith on the part of the workmen or the employer.

It is difficult to see however how the benefit that the workmen will get under the Employees State Insurance Act can affect the question of sickness leave being provided for the workmen. This Act it has to be noticed does not provide for any leave to the workmen on the ground of sickness.

In providing for periodical payments to an insured worker (sickness benefit) or for medical treatment or attendance to him or the members of his family, the Legislature did not intend to substitute any of these benefits for the workmen's right to get leave on full pay on the ground of sickness.

As regards those workmen to whom the Delhi Shops and Establishments Act, 1954, applies the Tribunal has acted illegally in fixing the period of sick leave at 15 days and permitting accumulation.

It will not be right to have two separate leave rules for the two classes of workmen, one to whom the Delhi Shops and Establishments Act, 1954, applies and the other to whom it does not apply. For that is likely to be a source of much discord and heart-burning. Therefore, in respect also of those workmen to whom the Delhi Shops and Establishments Act, 1954 does not apply, the same period of 12 days in a year with full pay and allowances should be fixed for sickness or casual leave, and there should be no accumulation of such leave.

The Leave Rules of the Company as they now stand provide that ordinarily previous permission of the head of the department and the Establishment Manager shall be obtained before casual leave is taken but that when this is not possible due to sudden illness, the head of the Department or the Manager as soon as may be practicable should be informed in writing of the absence from work and of the probable duration of such absence. This provision is reasonable and is calculated to meet the needs of workmen for taking leave without previous permission, in case of emergency.

It will not be proper to deprive an employee of the gratuity earned by him because of his dismissal for misconduct and the proper provision to make in this connection is that where an employee is dismissed for misconduct which has resulted in financial loss to the employer the amount lost should be deducted from the amount of gratuity due.

Assuming therefore that for the majority of the employees there is no existing retirement age it would be open to the Tribunal to fix the age of superannuation even with respect to them. As however the Tribunal's decision that this age should be 55 is vitiated by the incorrect assumption that there is an existing retirement age of 55 it has been necessary to consider the question. The retirement age is fixed at 58 years, subject to the proviso that it will be open to the Company to continue in its employment a workman who has passed that age. This rule should apply to all the employees of the Company.

No general formula can be laid down as to the date from which a Tribunal should make its award effective. That question has to be decided by the Tribunal on a consideration of circumstances of each case. There have been cases where this Court has made an award effective from the date when the demand was first made. There are other cases where the orders of the Tribunal directing the award to be made effective from the date of the award has not been interfered with. It is true that in some cases this Court has modified the Tribunal's award in such a case. It is difficult and not even desirable that this Court should try to lay down general principles on such matters that require careful consideration of the peculiar circumstances of each case for the exercise of discretion. There is no reason to interfere with the Tribunal's direction in this case that the reliefs given by it would become effective from the date of the reference.

Appeals by Special Leave from the Award dated the 16th March, 1959, of the Second Industrial Tribunal, Delhi in Reference I.D. No. 20 of 1958.

G. S. Pathak and S. T. Desai, Senior Advocates (*M. L. Sethi, B. Datta and Dr. Anand Parkash*, Advocates, with them), for Appellant (In C.A. No. 489 of 1961) and Respondent (In C.A. No. 490 of 1961).

M. C. Setalvad, Attorney-General for India, (*M. K. Ramamurthi D. P. Singh, R. K. Garg and S. C. Agarwal*, Advocates of *M/s. M. K. Ramamurthi & Co.*, with him), for Respondents (In C.A. No. 489 of 1961) and Appellants (In C.A. No. 490 of 1961).

The Judgment of the Court was delivered by

Das Gupta, J.—These two appeals by Special Leave, one by the employer and the other by the workmen, arise out of an industrial dispute that was referred for adjudication to the Industrial Tribunal, Delhi, by an order made on 23rd January, 1958, by the Chief Commissioner, Delhi. The Tribunal made its award on 16th March, 1959. Out of the numerous matters that were included in the terms of reference, we are concerned in these appeals only with a few. The employer challenges the award as regards: (1) Scales of pay, (2) Dearness allowance, (3) Adjustments, (4) Leave Rules, (5) Gratuity and (6) Retrospective effect of the award. The workmen also attacked the award as regards the scales of pay and dearness allowance. In addition, they have attacked the award as regards the working hours, leave rules, night shift allowance, retirement age and procedure for taking disciplinary action. At the time of the hearing before us however the learned Attorney-General, appearing for the workmen, did not press their claim for modification of the award as regards, night shift allowance, leave rules and procedure for taking disciplinary action and working hours.

It appears that when the dispute was before the Conciliation Officer, Delhi, for settlement an interim agreement was arrived at between the parties on 20th December, 1957, by which the management agreed to give certain interim reliefs, ranging between Rs. 6 to Rs. 10 per month from the month of November, 1957. One of the terms of the agreement was that this payment "will be adjusted against the final outcome of the demands by constitutional means". The Tribunal has in its award given a direction that this interim relief shall remain unaffected. Taking this to be a direction that the adjustment as agreed upon of payments under the interim arrangement shall not be made, the employer has in its appeal challenged the correctness of this direction also.

The most important of the matters in dispute are the questions of the wage scale, the dearness allowance and the adjustment of existing employees into the new scales. It appears that from 1946 onwards the Company's workmen have had a consolidated wage scale, no distinction being made between the basic wage and the dearness allowance. This wage scale has remained practically unaltered except for some special increments given in the year 1948. By the award the Tribunal has introduced new wage scales for certain existing categories of workmen and in some cases has introduced new scales, after amalgamating more than one category. Thus certain railway despatchers, advertisers, Box No. sorters, filing clerks and bank clerks who were formerly in the scale of Rs. 50-4-90 EB-4-115 and Junior Clerks, etc., who had a scale of Rs. 60-100 EB-4-115 have all been put on a new scale of Rs. 70-5-100 EB-5-150. There has been a similar amalgamation of clerks, assistants, cashiers, record keepers and others some of whom were on Rs. 80-175 and some on Rs. 80-200 scale, all of them being now put on a new scale of Rs. 90-200. In both cases the starting salary has been raised; the maximum has been raised for the first category. Supervisors and others who were formerly on three different scales, some on Rs. 125-350, some on Rs. 125-300, and some on Rs. 100-250, have all been amalgamated and have been put on a new scale of Rs. 100-350. Obviously, this would mean a lower starting salary for some and maximum for some. Job Daftries some of whom were on Rs. 70-115 scale and others on Rs. 100-155 have all been put on a new scale of Rs. 80 to Rs. 155, resulting thus in a lowering of starting salary for some and a rise of the higher maximum for all. A similar lowering in the starting salary has also occurred in cases of some of the job-machinememen. They were formerly on two scales, one of Rs. 100-175 and the other of Rs. 75-175. The Assistant Foremen in the Job Department formerly on Rs. 125-175 are put on a scale of Rs. 125-202. Where there has been no amalgamation the new scale has resulted in a slight increase in some cases both in the starting salary and the maximum. In some categories, no change has been made at all.

It is unnecessary to give more details of the difference between the old scale and the new scale as what has been mentioned above is sufficient to indicate that there has been some change in favour of the workmen, though this change is not much. The employer's contention before us is that there was no case for any revision whatsoever and the Tribunal acted wrongly in making any change in the old wage scale. The workmen's contention on the contrary is that the changes do not go far enough.

The fixation of wage structure is among the most difficult tasks that industrial adjudication has to tackle. On the one hand not only the demands of social justice but also the claims of national economy require that attempts should be made to secure to workmen a fair share of the national income which they help to produce, on the other hand, care has to be taken that the attempt at a fair distribution does not tend to dry up the source of the national income itself. On the one hand, better living conditions for workmen that can only be possible by giving them a "living wage" will tend to increase the nation's wealth and income, on the other hand, unreasonable inroads on the profits of the capitalists might have a tendency to drive capital away from fruitful employment and even to affect prejudicially capital formation itself. The rise in prices that often results from the rise of the workmen's wages may in its turn affect other members of the community and

may even affect prejudicially the living conditions of the workmen themselves. The effect of such a rise in price on the country's international trade cannot also be always ignored. Thus numerous complex factors, some of which are economic and some spring from social philosophy give rise to conflicting considerations that have to be borne in mind. Nor does the process of valuation of the numerous factors remain static. While international movements in the cause of labour have for many years influenced thinking—and sometimes even judicial thinking—in such matters, in this country, the emergence of an independent democratic India has influenced the matter even more profoundly. Gajendragadkar, J., speaking for the Court in *Standard Vacuum Refining Co. of India v. Its Workmen*¹, has observed :—

“In constructing a wage structure in a given case industrial adjudication does take into account to some extent considerations of right and wrong, propriety and impropriety, fairness and unfairness. As the social conscience of the general community becomes more alive and active, as the welfare policy of the State takes a more dynamic form, as the national economy progresses from stage to stage, and as under the growing strength of the trade union movement, collective bargaining enters the field, wage structure ceases to be a purely arithmetical problem. Considerations of the financial position of the employer and the state of national economy have their say, and the requirements of a workman living in a civilised and progressive society also come to be recognised.”

In trying to keep true to the two points of social philosophy and economic necessities which vie for consideration, industrial adjudication has set for itself certain standards in the matter of wage fixation. At the bottom of the ladder, there is the minimum basic wage which the employer of any industrial labour must pay in order to be allowed to continue an industry. Above this is the fair wage, which may roughly be said to approximate to the need based minimum, in the sense of a wage which is “adequate to cover the normal needs of the average employee regarded as a human being in a civilised society”. Above the fair wage is the “living wage”—a wage “which will maintain the workmen in the highest state of industrial efficiency, which will enable him to provide his family with all the material things which are needed for their health and physical well-being, enough to enable him to qualify to discharge his duties as a citizen”. (Cited with approval by Mr. Justice Gajendragadkar in *Standard Vacuum Company's case*¹, from “The living Wage” by Phillip Snowden).

While industrial adjudication will be happy to fix a wage structure which would give the workmen generally a living wage economic considerations make that only a dream for the future. That is why the industrial tribunals in this country generally confine their horizon to the target of fixing a fair wage. But there again, the economic factors have to be carefully considered. For these reasons, this Court has repeatedly emphasised the need of considering the problem on an industry-cum-region basis, and of giving careful consideration to the ability of the industry to pay. (Vide *Crown Aluminium's case*²; the *Express Newspapers, Ltd. case*³ and the *Lipton's case*.⁴)

On an examination of the Tribunal's award as regards the wage scale, we are satisfied that all the considerations mentioned above were present in the mind of the adjudicator and we are of opinion that there is nothing that would justify us in modifying the award either in favour of the employer or in favour of the workmen. It is stated in the award that before the Tribunal the Company's representative desired that a fair wage level within its paying capacity should be evolved though at the time he argued that existing wage structure is quite fair “looking to the Company's financial position as well as the comparative rates prevailing in other concerns”. The Tribunal has not accepted the Company's contention that the existing wage structure is fair, though at the same time it has held that the wage system needs no such radical change as alleged by the Union. Mr. Pathak, who appeared before us for the Company, did not seriously suggest that the present wage

1. (1961) 1 S.C.J. 582 : (1961) S.C.R. 536 at 543.

2. (1958) S.C.J. 209 : (1958) M.L.J. (Cr.) 109 : (1958) S.C.R. 651.

3. (1958) S.C.J. 1113 : (1959) S.C.R. 12.

4. (1959) S.C.J. 772 : (1959) M.L.J. (Cr.) 511 : (1959) Supp. (2) S.C.R. 150.

structure gives the employees "a fair wage". He argued generally that no case was made out for any revision of the wage structure. Such an extreme proposition has only to be mentioned to deserve rejection. At the time the Tribunal was dealing with this question the wage scale of the workmen in this concern had remained practically unaltered for almost 12 years—12 years of momentous change through which social ideas have moved forward in favour of workmen getting a better share of the national income; 12 years during which the new India was born and a Constitution was framed for this new democracy "to secure to all its citizens, justice, social and economic and political" and enshrining in its 43rd Article the principle that

"the State shall endeavour to secure by suitable legislation or economic organization or in any other way to all workers agricultural, industrial or otherwise" among other things "a living wage and conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities....."

The mere passage of time and these revolutionary changes would be sufficient to convince any right thinking man of the need for revision of wage scales which, on the face of it, were far below the "living wage" and mostly also below the "fair wage", provided the industry could bear the additional burden. The case for revision becomes irresistible when one takes into consideration the further fact that the cost of living rose steeply during this period. On the basis of 1939 cost as 100, the index for 1946 was 282. By 1958 it had risen to 389. It may be mentioned that since then there has been a further rise. Nor can it be seriously suggested that this concern cannot bear the burden of an increased wage scale. The Tribunal was, in our opinion, right in its conclusion that the material on record shows that the Company has been prospering and has financial stability. We have for ourselves examined the balance-sheets and the other materials on the record and have no hesitation in agreeing with that conclusion. Mr. Pathak's uphill task in the face of these balance-sheets already on the record to show that the Company would not be able to bear the burden of an increased wage scale has been made more difficult by the discovery that even after the implementation of the award the Company has made large profits during the years 1959-60, 1960-61 and 1961-62.

It appears that when the Company was given Special Leave to appeal to this Court the operation of the Tribunal's award was stayed only in so far as it directed the management to pay arrears of the wages determined thereby but the operation of the award in so far as it related to the payment of wages from the date of the award was not stayed; and the management was directed to pay to the workmen from that date wages in accordance with the wage scale fixed by the Tribunal by its award under appeal. The result of this has been that the Tribunal's award as regards the wage scales has been implemented with effect from the date of the award and it is possible for this Court to know how such additional payment has affected the financial position of the Company. It appears that after meeting the additional charges and also after payment of bonus and appropriation to reserves the net profits for the year 1959-60 rose to Rs. 8,04,508. For the year 1960-61 these profits were Rs. 8,44,627. For the year 1961-62 the profits are shown in the balance-sheet as Rs. 59,955. That the Company has been prospering is clear. It has its own aeroplanes and possesses immovable properties of considerable value. It has built up good reserves and in spite of that it has been making good profits. It is reasonable to think that with the progress of education in the country and the increasing news mindedness of the people the future prospects of the Company are no less bright. On a consideration of all this, we are clearly of opinion that Mr. Pathak's contention that the wage scale fixed by the Tribunal is too heavy for the Company to bear, must be rejected.

Equally unacceptable is Mr. Pathak's next contention that the wage scale fixed by the Tribunal operates unfavourably on this Company *vis-a-vis* two other concerns in Delhi region, *viz.*, the Times of India, Delhi and the Statesman, Delhi. We have compared the wage scales in these two concerns, *viz.*, the Times of India, Delhi and the Statesman, Delhi, with the wage scale under the award

and have for the purpose of comparison taken into consideration the dearness allowance as fixed by the Tribunal. The comparison shows that while in some cases the Company (the Hindustan Times) will have to pay more to its workmen than what is being paid to workmen of the same category by the Times of India, Delhi and the Statesman, Delhi, in several cases it will be less. It has also to be borne in mind that the Times of India, Delhi and the Statesman, Delhi, are much smaller units of the newspaper industry than the Hindustan Times. These companies are mere adjuncts to the Times of India, Bombay and the Statesman, Calcutta, respectively. Therefore, even if for some categories the wage scale under the award is higher than that in the Times of India, Delhi and the Statesman, Delhi, that would be no ground for modifying the award in favour of the Company. We have therefore come to the conclusion that there is no ground whatsoever for modifying the wage scale fixed by the award in favour of the Company.

On behalf of the workmen it was strenuously contended that the increase given by the award over the previous wage scale falls far short of justice. It is pointed out that even the Times of India, Delhi and the Statesman, Delhi, which are much smaller concerns and of lesser financial stability and strength, pay to some categories of its workmen higher wages than what has been fixed by the award. Thus our attention has been drawn to the fact that for Assistants, the Times of India, Delhi, rate is Rs. 241-402, and in the Statesman, Delhi, it is Rs. 190-297 for some and Rs. 264-463 for others while under the award the scale is Rs. 125-375. There are several other cases also where the wage scale under the award appears to be lower than what is being paid by the Times of India, Delhi and the Statesman, Delhi.

It has been urged by the learned Attorney-General that in view of the fact that the wage scale of the Company has remained practically stationary for the last 12 years and that it is indisputably well below the fair wage and the further fact that even smaller concerns in this region, like the Times of India, Delhi, and the Statesman, Delhi, have been paying more to some categories of its workmen, the wage scale as fixed by the Tribunal should be raised at least for some of the categories. There is undoubtedly some force in the contention and it may be said that the Tribunal has been rather cautious in the matter of revision of wage scales. Even so, it has to be remembered that where, as in the present case, the proper principles have been applied by the Tribunal, it is not the practice of this Court to interfere, ordinarily, with details of this nature when exercising its special jurisdiction under Article 136 of the Constitution. It also appears to us that the very fact that the Tribunal has been cautious in the matter of raising the wage scales has influenced it in the directions it has given on the question of adjustment of the present employees into the wage scale. In this way some relief has been given to the present employees which might otherwise have been given by raising the wage scale. On a consideration of all these facts we have reached the conclusion that it will not be proper for us to modify the wage scales fixed by the Tribunal in favour of the workmen also.

On the question of dearness allowance it is not disputed before us that in the circumstances of the present case the Tribunal acted rightly in awarding dearness allowance at a flat rate for all categories of workmen. On behalf of the Company it was however urged that the Tribunal has made an obvious mistake in fixing the amount of dearness allowance at Rs. 25. For fixing the rate at Rs. 25 the Tribunal has said :

"In view of the revised scales as now laid down, I think the same should further be supplemented in the circumstances stated above by a flat rate of dearness allowance in all cases, viz., Rs. 25 with retrospective effect from the date of reference so that the lowest paid worker will start not less than Rs. 75. I direct accordingly."

Mr. Pathak points out that the lowest paid worker for whom wage scales have been fixed will be getting under the award a minimum of Rs. 60 so that with the dearness allowance of Rs. 25 "the lowest paid worker" will start at Rs. 85 and not Rs. 75. Mr. Pathak suggests that the Tribunal has made a mistake in its calculations and that having decided that the lowest paid worker will start at not less than Rs. 75, it should have fixed Rs. 15 and not Rs. 25 as the dearness allowance. This argu-

ment however overlooks the fact that the reference as regards the dearness allowance was in respect of all categories of workmen, though the reference as regards scales of pay did not cover some categories, viz., mazdoors and canteen boys. They therefore continue to remain on their old scale of Rs. 50-3-85. When the Tribunal in considering the question of dearness allowance was thinking of the starting pay of the lowest paid worker it had obviously these categories in mind. Having concluded that the lowest paid worker should start at Rs. 75 as the total amount of basic pay and dearness allowance the necessary conclusion reached by the Tribunal was that Rs. 25 should be fixed as the dearness allowance. It is, in our opinion, proper and desirable that the dearness allowance should not remain fixed at this figure but should be on a sliding scale. As was pointed out in *Workmen of Hindusthan Motors v. Hindusthan Motors*¹, the whole purpose of dearness allowance being to neutralise a portion of the increase in the cost of living, it should ordinarily be on a sliding scale and provide for an increase on rise in the cost of living and a decrease on a fall in the cost of living. On a consideration of all the circumstances of this case, we direct that a sliding scale be attached to the dearness allowance of Rs. 25 per month as awarded by the Tribunal on the lines that it will be liable to be increased or decreased on the basis of Re. 1 for every ten points in case of rise and fall in the cost of living from the base of 400, the 1939 index being taken to be 100 the sliding scale to take effect from 1st April, 1959.

This brings us to the question of adjustment of the existing employees into the new scale. The Tribunal has dealt with this matter thus :—

“.....the adjustment in the new scales shall be made with retrospective effect from the date of the reference, viz., 23rd January, 1958. In making adjustment in the new scales no one shall be adversely affected and it shall be on the line laid down by the Industrial Tribunal in the case of *Caltex India, Ltd.*², read with para. 23 of the decision of the Labour Appellate Tribunal, reported in 1952 L.L.J. 183 at page 188.”

It appears that in the case of *Caltex India, Ltd.*², the Industrial Tribunal, West Bengal, gave the following directions for adjustment of employees into the wage scale fixed by it :—

“1. All employees for whom the scale has been stated above should be stepped up in the state next above which the present pay is drawn. A special increment at the rate of one increment in the new scale for every three completed years of service should be given.

2. The employees whose salaries are less than the minimum prescribed will be pulled up to the minimum of the prescribed scale.

3. If the existing salary of an employee is higher than the salary he will be entitled to under the prescribed scale, there will be no cut and he will be stepped up to the nearest increase with the increments given above.

4. After the salaries are adjusted, no employee should be staggered and he will continue to get future increments.

5. If an employee be already drawing a salary which is higher than the maximum prescribed by the award, he will be subjected to no cut in his salary.”

This was followed by a direction as regards the date by which the adjustment was to be made. The Labour Appellate Tribunal modified these directions by introducing two provisions: (1) that the maximum of the grade should not be exceeded and (2) that the basic wage that was being paid to an employee at the date of the award of the Tribunal is not to be affected to the employees' prejudice. The employer's objection is to the provision that a special increment at the rate of one increment in the new scale for every three completed years of service should be given. It is argued that such a provision may well be appropriate in a case where wage scale is being fixed for the first time or where even if there was already a wage scale in force the rate of increment in the new scale is much higher than that in the old wage scale, but not where, as in the present case, the increments under the new scale and the old scale are practically the same. We are not impressed by this argument.

1. (1962) 2 L.L.J. 352.

2. (1951) L.L.J. 654 at 659.

As was pointed out by this Court in a recent judgment in *French Motor Car Co., Ltd. v. Its Workmen*¹, what adjustment should be given is to be decided when fixing wage scales whether for the first time or in place of an old existing scale has to be decided by industrial adjudication after consideration of all the circumstances of the case. It may well be true that in the absence of any special circumstances an adjustment of the nature as allowed in this case by allowing special increment in the new scale on the basis of service already rendered may not be appropriate. Clearly, however, in the present case the Tribunal took into consideration in deciding this question of adjustment the fact that it had been extremely cautious as regards increasing the old wage scales. Apparently, it thought that it would be fair to give some relief to the existing employees by means of such increase by way of adjustment while at the same time not burdening the employer with higher rates of wages for new incumbents. In these circumstances, we do not see any justification for interfering with the directions given by the Tribunal in the matter of adjustments.

It will be convenient to consider at this stage the objection raised in the Company's appeal to the Tribunal's direction in connection with the interim agreement. As has been stated earlier, this agreement was arrived at between the parties when the dispute was before the Conciliation Officer. The relevant portion of the agreement is in these words :—

" It is hereby agreed between the parties that :—

1. The Management agrees to make interim relief on the following terms to every employee, excluding working journalists, drawing salary upto Rs. 400 p.m.

(i) Advance payment ranging between Rs. 6 to Rs. 10 per month beginning from the month of November, 1957 in the following manner :—

(a) Those with annual increment of Rs. 3, Rs. 1 and Rs. 5 .. Rs. 6.

(b) Those with annual increment of Rs. 6 .. Rs. 7.

(c) Those with annual increment of Rs. 7 .. Rs. 8.

(d) Those with annual increment of Rs. 10 .. Rs. 10.

Note.—(i) In case any employee has already reached the ceiling of his grade, even then he would be entitled for the above benefit.

(ii) This payment will be adjusted against the final outcome of the present demands by constitutional means."

"The final outcome of the present demands by constitutional means" is the Tribunal's award. Under the agreement therefore what has been received by the workmen as advance payment at Rs. 6 or Rs. 7 or Rs. 8 or Rs. 10 per month as interim relief has to be adjusted against what is due to be paid to them under the award. In other words, the Company is entitled under the agreement to deduct the payments made as interim relief from what is payable to these very employees under the award. The Tribunal's direction that the interim relief shall remain unaffected is in effect an order that term (ii) of the agreement need not be complied with. We can find no justification for such an order. While it is true that industrial adjudication can and often has to modify existing contracts between an employer and its workmen, there can be no justification for modification of an agreement of this nature pending final settlement of a dispute. Such a direction that the solemn words of the workmen's representatives that interim relief which may be given will be adjusted against the relief finally given need not be complied with, is not only unfair to the employer but is also not calculated to serve the best interests of the workmen themselves. For one thing, an order of this nature in one case by a Tribunal that such an undertaking need not be carried out is likely to hamper interim settlements generally; it is also not desirable that workmen should be encouraged to treat their undertakings as of no value. Industrial adjudication must be careful not to encourage bad faith on the part of the workmen or the employer. A direction as given by the Tribunal in this case that the term in the agreement that payments

made will be adjusted against the final out-come need not be complied with, is unfortunately likely to have such effect on workmen. We therefore set aside the Tribunal's directions that interim relief will remain unaffected and direct that adjustments should be made in terms of the said interim arrangement.

This brings us to the question of Leave Rules. The Company objects to the award as regards this matter in so far as it directs the Company to allow 15 days' sick leave with full pay and allowances with accumulation up to six months on production of medical certificate given by a registered medical practitioner. It also objects to the direction that the present practice as to insistence on previous application for the purpose of casual leave should not be relaxed in cases where it cannot possibly be so done in emergent and unforeseen circumstances and the direction that upto 3 days no medical certificate should be asked for. It appears that at present the Management grants 10 days' casual leave to the business staff and 7 days' casual leave to all the other categories and there is no sick leave facility available.

Mr. Pathak has tried to convince us that in view of the provisions of the Employees State Insurance Act, 1948, no provision need be made about sickness leave at all. That this Act has been applied to the Company and that the workmen of the Company get the benefit of this Act is not disputed. It is difficult to see however how the benefit that the workmen will get under this Act can affect the question of sickness leave being provided for the workmen. This Act it has to be noticed does not provide for any leave to the workmen on the ground of sickness. It provides in section 46 (1) (a) for periodical treatment of any insured person in case of his sickness if certified by a duly appointed medical practitioner. It is unnecessary to mention here the several provisions in the Act, *viz.*, sections 47, 48 and 49 which deal with the eligibility of workmen for sickness benefit and the extent of the benefit that may be granted. Section 56 of the Act provides for medical benefits to the insured workmen or in certain cases to the members of his family. It appears to us clear however that in providing for periodical payments to an insured worker in case of sickness (sickness benefit) or for medical treatment or attendance to him or the members of his family, the Legislature did not intend to substitute any of these benefits for the workmen's right to get leave on full pay on the ground of sickness.

It is next contended that the Tribunal's directions as regards sickness leave offend the provisions of Delhi Shops and Establishments Act, 1954. Admittedly, a large number of workmen covered by the reference are governed by the provisions as regards leave under the Delhi Shops and Establishments Act, 1954. Section 22 of that Act fixes the maximum for sickness or casual leave with wages to a period of 12 days and further provides that such leave shall not be accumulated. It is thus clear that as regards those workmen to whom the Delhi Shops and Establishments Act, 1954, applies the Tribunal has acted illegally in fixing the period of sick leave at 15 days and permitting accumulation. We therefore set aside this direction in the award and direct instead that the Company shall allow to the workmen to whom the Delhi Shops and Establishments Act, 1954, applies, sickness or casual leave of a total of 12 days with full pay and allowances and that such leave shall not be accumulated. We are also of opinion that it will not be right to have two separate leave rules for the two classes of workmen, one to whom the Delhi Shops and Establishments Act, 1954, applies and the other to whom it does not apply. For that is likely to be a source of much discord and heart-burning. Therefore, in respect also of those workmen to whom the Delhi Shops and Establishments Act, 1954, does not apply, we think that the same period of 12 days in a year with full pay and allowances should be fixed for sickness or casual leave, and there should be no accumulation of such leave; and we direct accordingly.

We cannot find any justification for the direction of the Tribunal that the practice of insistence on previous application for the purpose of casual leave should be relaxed in cases where it cannot possibly be so done in emergent and unforeseen circumstances and that upto 3 days no medical certificate should be asked for. The leave rules of the Company as they now stand provide that ordinarily previous

permission of the Head of the Department and the Establishment Manager shall be obtained before casual leave is taken but that when this is not possible due to sudden illness, the Head of the Department or the Manager as soon as may be practicable should be informed in writing of the absence from work and of the probable duration of such absence. In our opinion, this provision is reasonable and is calculated to meet the needs of workmen for taking leave without previous permission, in case of emergency. In these circumstances, the further directions as regards this that have been given by the Tribunal appear to us to be unnecessary and are hereby set aside.

On the question of gratuity, the only argument seriously pressed by Mr. Pathak was that the scheme as framed by the Tribunal would put undue strain on the Company's resources. We have already expressed our agreement with the Tribunal's conclusion that the Company's financial resources are strong and stable and that not only has the Company been prospering in recent years but that its future prospects are also bright. Therefore, we do not think that the scheme of gratuity as framed by the Tribunal is unduly favourable to the workmen or that it places any undue strain on the Company's financial resources.

One provision in the gratuity scheme which ought to be mentioned is that under it an employee who is dismissed for misconduct shall not be entitled to any gratuity. It has been pointed out by this Court in more than one case that having regard to the nature of gratuity it will not be proper to deprive an employee of the gratuity earned by him because of his dismissal for misconduct and the proper provision to make in this connection is that where an employee is dismissed for misconduct which has resulted in financial loss to the employer the amount lost should be deducted from the amount of gratuity due. As however in the present case, the workmen have not appealed against the award as regards the gratuity scheme framed by the Tribunal, it will not be proper for us to make the modification as indicated above.

Coming now to the question of retirement age on which the workmen have appealed, we find there is some controversy as regards the existing position. The workmen stated in their written statement before the Tribunal that "at present there are no set rules in the Company in this matter." Their claim was that the retirement age should be fixed at 60 for all the employees of the Company. According to the Management's written statement "the existing superannuation system is that the age of retirement is fixed at 55". The Management further stated that the age of retirement "as fixed, that is, 55 years" is appropriate and should not be raised. In respect of this controversy as regards the existing position there appears to be little material on the record. From the appointment letters of some of the employees that we find on the record it appears that for some appointments made in 1955 the age of retirement was mentioned as 55. In the several letters of appointments made prior to that year no age of retirement has been mentioned. It is not clear, therefore, how on the question of retirement age the Tribunal proceeded on the basis that the "existing retirement" age is 55. Proceeding on this basis the Tribunal directed

"that the existing retirement age at 55 years should continue but the workers may be allowed to remain in employment and work upto 60 years if found fit. The question of the further extension should rest with the discretion of the Management."

On behalf of the workmen the learned Attorney-General has contended that the assumption that the existing retirement age is 55 is wrong in respect of most of the workmen and that except for a few persons appointed after 1955 no retirement age is fixed either in the letters of appointment or in the Standing Orders of the Company. For all these employees for whom no retirement age has been fixed already, the learned Attorney-General argues on the basis of the decision of this Court in *Guest, Keen Williams Private Ltd. v. P.J. Sterling & others*¹, that it would not be fair to fix any age of superannuation. It was held in that case that it was unfair to fix the age of superannuation of previous employees

by a subsequent Standing Order. The Labour Appellate Tribunal had held that it would be unreasonable and unfair to introduce a condition of retirement at the age of 55 in regard to the prior employees having regard to the fact that when they entered service there was no such limitation. This Court felt that it would not be justified in reversing this decision of the Labour Appellate Tribunal. Dealing next with the question whether it followed that there should be no rule of superannuation in regard to these previous employees the Court said:

"In our opinion it is necessary to fix the age of superannuation even with regard to the prior employees, and we feel no difficulty in holding that it would not be unfair or unreasonable to direct that these employees should retire on attaining the age of 60. An option to continue in service even thereafter which the respondent claimed is wholly unreasonable and is entirely inconsistent with the notion of fixing the age of superannuation itself. Once the age of superannuation is fixed it may be open to the employer for special reasons to continue in its employment a workman who has passed that age; but it is inconceivable that when the age of superannuation is fixed it should be in the option of the employee to continue in service thereafter. We would accordingly hold that in the circumstances of this case the rule of retirement for the previous employees in the concern should be 60 instead of 55 and that the rule of 55 should apply to all employees who enter the service of the appellant after the relevant Standing Orders came into force."

Assuming therefore that for the majority of the employees there is no existing retirement age it would on the authority of the above case, be open to the Tribunal to fix the age of superannuation even with respect to them. As however the Tribunal's decision that this age should be 55 is vitiated by the incorrect assumption that there is an existing retirement age of 55 it has been necessary for us to consider the question for ourselves. It appears that before the Tribunal the Union's representative himself desired that the retirement age should be fixed at 58 years which may be extended upto 60 years in fit cases. Before us the Counsel for the Company did not seriously contest that in consideration of the present day circumstances in the country it would be fair to fix the retirement age at 58. Accordingly, we set aside the Tribunal's award on this question of retirement age and fix the age at 58 years subject to the proviso that it will be open to the Company to continue in its employment a workman who has passed that age. This rule should apply to all the employees of the Company.

There remains for consideration the question of retrospective operation of the award. Under section 17-A of the Industrial Disputes Act, 1947, an award shall come into operation with effect from such date as may be specified therein but where no date is so specified it shall come into operation on the date when the award becomes enforceable. Even without a specific reference being made on this question it is open to an industrial tribunal to fix in its discretion a date from which it shall come into operation. The reference, in the present case, included as a matter in dispute the question of retrospective effect in these words:

"Whether all the above demands should be made applicable retrospectively with effect from 1st April, 1956, and what directions are necessary in this respect?"

The Tribunal rejected the workmen's claim for giving effect to its award from April, 1956. Wherever however the Tribunal has given relief the Tribunal has directed that the award should come into effect from the date of reference, i.e., the 23rd January, 1958. On behalf of the Company Mr. Pathak contends that there is no reason why the award should be given effect to from any date prior to the date of its pronouncement. We are not impressed by this argument. No general formula can be laid down as to the date from which a Tribunal should make its award effective. That question has to be decided by the Tribunal on a consideration of circumstances of each case. There have been cases where this Court has made an award effective from the date when the demand was first made. There are other cases where the orders of the Tribunal directing the award to be made effective from the date of the award has not been interfered with. It is true that in some cases this Court has modified the Tribunal's award in such a case. But it does not appear however that any general principles have been laid down. Indeed, it is difficult and not even desirable that this Court should try to lay down general principles on such matters that require careful consideration of the peculiar

circumstances of each case for the exercise of discretion. It is sufficient to say that we find no reason to interfere with the Tribunal's direction in this case that the reliefs given by it would become effective from the date of the reference.

We therefore allow both the appeals in part by modifying the Tribunal's award as regards dearness allowance, leave rules and retirement age and also as regards the adjustment of the interim relief as mentioned above. In all other matters in appeal before us the award is confirmed. The modifications made as regards dearness allowance will, as already stated, take effect from 1st April, 1959. The modifications as regards leave rules and as regards retirement age will take effect from this date. In both the appeals the parties will bear their own costs.

V.S.

Appeals allowed in part.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Ladli Parshad Jaiswal

*Appellant**

v.

The Karnal Distillery Co., Ltd. Karnal and others

Respondents.

Constitution of India (1950), Article 133 (1)—“Court immediately below”—Meaning of—Single judge of High Court deciding Second Appeal—Reversal of decision in L. P. Appeal—Appeal to Supreme Court—Conditions—Civil Procedure Code (V of 1908), section 110—“Court immediately below”.

Civil Procedure Code (V of 1908), section 100—Finding of fact—Finding as to undue influence—If conclusive and binding in Second Appeal—Finding based on allegations neither pleaded nor proved—Finality

Civil Procedure Code (V of 1908), Order 6, rule 4—Plea of undue influence—Essentials—Necessity for particulars—Duty of party.

Contract Act (IX of 1872), section 16—Undue influence—What constitutes—Burden of proof—Onus when shifts.

The expression “Court immediately below” in Article 133 (1) of the Constitution must mean the Court from the decision of which an appeal has been filed to the High Court, whether such Court is a single Judge of the High Court or a Court subject to the superintendence of the High Court. There is nothing in the phraseology used or the context which justifies the view that the expression “Court immediately below”, is used in section 110, Civil Procedure Code or in Article 133 (1) of the Constitution in two different senses, according as the Court is trying a proceeding in exercise of original jurisdiction and in exercise of its appellate jurisdiction.

A single Judge of the High Court hearing either a proceeding as a Court of original jurisdiction or in exercise of appellate jurisdiction is a “Court immediately below” the Division Bench which hears an appeal against his judgment under clause 10 of the Letters Patent (Lahore).

If the decree or order of the Division Bench reverses the judgment of the single Judge trying a suit or a proceeding in exercise of original jurisdiction or appellate jurisdiction of the High Court, and the condition as to valuation is satisfied, an appeal lies as a matter of course, without satisfying the condition that it involves a substantial question of law.

Whether a particular transaction was vitiated on the ground of undue influence is primarily a question of fact, and the finding on the question is not liable to be reopened in Second Appeal, if fairly tried. But a decision of the first appellate Court reached after placing the onus wrongly or based on no evidence or where there has been substantial error or defect in the procedure, producing error or defect in the decision of the case on the merits, is not conclusive and is not binding in Second Appeal. Where the conclusion on the issue of undue influence was based on allegations which were never pleaded and proved, it will be interfered with by the High Court in Second Appeal. Under Order 6, rule 4, Civil Procedure Code, in all cases in which a party pleading relies on any undue influence, particulars must be stated in the pleading. A vague or general plea can never serve the purpose; the party pleading must be required to plead the precise nature of the influence exercised the manner of the use of that influence and the unfair advantage obtained by the party using it.

The doctrine of undue influence under the Common Law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The India Law enacted in section 16 of the Contract Act, is founded substantially on rules of English Common Law.

A transaction may be vitiated on the ground of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other. Both the conditions have ordinarily to be established by the person seeking to avoid the transaction.

Sub-section (2) of the section lays down a special presumption as to when a person is deemed to be in a position to dominate.

Sub-section (4) which shifts the burden has a limited application ; the presumption under it will only arise if it is established by evidence that the party who had obtained the benefit was in a position to dominate the will of the other and that the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled, the presumption of undue influence will not arise and the burden will not shift.

Appeal from the Judgment and Decree dated the 18th October, 1947 of the Punjab High Court in Letters Patent Appeal No. 100 of 1954.

B.R. Tuli, S.K. Kapur and K.K. Jain, Advocates, for Appellant.

M.C. Setalvad, Attorney-General for India, (*A.N. Khanna and Harbans Singh*, Advocates with him), for Respondents.

The Judgment of the Court was delivered by

Shah, J.—One Kishori Lal Jaiswal started a 'distillery business' in the name of Kishori Lal & Sons and set up a factory at Karnal in the Punjab for manufacturing liquor. Kishori Lal died in 1928 leaving him surviving three sons, Durga Prasad, Ladli Prasad and Shanti Prasad. Durga Prasad who was the eldest surviving member became *karta* of the joint Hindu family, and continued the family business. On the death of Durga Prasad in 1934 leaving him surviving two sons Sajjan Lal and Madan Lal and his wife Suraj Mukhi, Ladli Prasad became the *karta* of the family and continued the business. By mutual arrangement on 5th November, 1940, the joint Hindu family of the three branches was disrupted and the business of Kishori Lal & Sons was thereafter conducted as a partnership concern each branch having a third share therein. On 23rd March, 1941, a private limited company called the Karnal Distillery Company Ltd. was incorporated under the Indian Companies Act, 1913, and the business of Kishori Lal & Sons was taken over by that Company. Under the final allotment of shares made by the Company on 1st August, 1941—1,004 shares were allotted to the branch of Durga Prasad, 1,503 shares to Ladli Prasad and 1,003 to Shanti Prasad. By the Articles of Association the maximum number of Directors was five and the minimum number was two. Ladli Prasad, Shanti Prasad and Suraj Mukhi were appointed as the first Directors of the Company. Every year one-third of the Directors except the Managing Director were to retire by rotation. Ladli Prasad was appointed Managing Director for ten years with the right to continue for another ten years unless a notice of fifteen days within eight years was given by a two-third majority at a special general meeting held for the purpose of terminating his appointment as Managing Director, and that two-third of the total number of members could expel a member of the Company. Ladli Prasad as Managing Director of the Company drew an allowance of Rs. 1,800 per-month, a commission of $7\frac{1}{2}$ per cent. on net profits of the Company, a motor-car allowance of Rs. 350 per month, with a right to be provided a new motor-car every three years for personal use and Rs. 30 per day as travelling allowance. The other Directors of the Company were paid remuneration at the rate of Rs. 250 per month, and each Director who attended the meeting of the Board of Directors was allowed in addition Rs. 25 per day.

Manifestly there was great disparity between the remuneration received by Ladli Prasad and the other Directors, and this gave rise to quarrels between the members of the family. At an extraordinary general meeting of the company held on 20th February, 1945, at which Shanti Prasad, Sajjan Lal, Madan Lal and Suraj Mukhi were present, it was resolved that Ladli Prasad be removed from his office of Managing Director and that Shanti Prasad be appointed Managing Director instead. But Ladli Prasad declined to hand over charge of the Managing Director's office to Shanti Prasad. A suit was thereupon filed by Shanti Prasad in the Court of the Subordinate Judge, Karnal, on behalf of the Company against Ladli

Prasad on 10th April, 1945, for a declaration that he was lawfully appointed Managing Director of the Company and for enforcing the resolution dated 20th February, 1945. Ladli Prasad in his turn filed a suit for a declaration that Shanti Prasad had ceased to be a Director of the Company. In the suit filed by Shanti Prasad on behalf of the Company, the trial Court appointed Suraj Mukhi and Madan Lal as Joint Receivers to manage the affairs of the Company for the duration of the suit. Against that order Ladli Prasad appealed to the High Court of Judicature at Lahore and obtained an order staying the operation of the order appointing Receivers. On 16th October, 1945, at an extra-ordinary general meeting of the Company held at the residence of Ladli Prasad at which all the members of the family were present certain special resolutions were passed. The effect of the resolutions was that :—

(1) Each branch of the family should own 1,170 shares and for this purpose Ladli Prasad should transfer 167 shares to Shanti Prasad and 166 to the branch of Durga Prasad.

(2) Resolution dated 20th February, 1945, purporting to remove Ladli Prasad from the Managing Directorship was cancelled.

(3) Resignation of Ladli Prasad of his post as Managing Director was accepted, and he was appointed permanent Director and Chairman, and Madan Lal s/o Durga Prasad was appointed Director in place of Suraj Mukhi who submitted her resignation. Shanti Prasad continued to be a Director of the Company.

(4) The maximum number of Directors was fixed at three and the quorum of the Directors' meeting was also fixed at three.

(5) Every decision submitted to a meeting of the Directors or members was to be deemed to be passed only if the decision thereon be unanimous, and the proceedings recorded being signed by the Chairman of the Company and all the Directors or the members, as the case may be, present at the meeting.

(6) Shanti Prasad was appointed Manager for five years under the control of the Board of Directors.

(7) Article 47 which gave power to a two-third majority to expel a member of the Company was deleted.

(8) Each Director was to be paid Rs. 900 per month as remuneration and Rs. 25 for each meeting of the Board of Directors attended. No extra remuneration to be paid to Shanti Prasad as Manager or to Ladli Prasad as Chairman.

(9) Ladli Prasad gave up the remuneration which had been provided for him under the Articles of Association as originally framed and he was discharged in respect of all previous accounts which were ratified and confirmed.

(10) All contracts executed, business done, benefits derived by Ladli Prasad under the facilities granted to him by resolution dated 30th April, 1941, of the Board of Directors were confirmed and ratified and all transactions recorded in the accounts of the Company for the period 1st April, 1941, till the date of the resolution were ratified and it was resolved that the accounts of each of the four years ending 31st March, 1942, 1943, 1944 and 1945 be confirmed.

(11) Dividend at the rate of 65 per cent. of the face value of the share free of Income-tax was declared.

(12) While ratifying and confirming the contracts executed, business done, benefits derived in the name, of or from the Company by any Director or the Managing Director of the Company in the past, it was resolved that in future no Director of the Company will contract in the name of the Company for his personal benefit.

(13) A large number of Articles of Association of the Company were amended in order to make them consistent with the special resolutions.

Effect was given to these resolutions. Shanti Prasad assumed the office of Manager of the Company and took charge of the Company's properties, assets and business. The adjustment in share-holding of the members was also effected, Ladli Prasad having transferred the shares according to the terms of the resolutions. But disputes started afresh. In a meeting of the Board of Directors held on 3rd March, 1946, at which Shanti Prasad and Madan Lal were present, it was resolved to call an extraordinary general meeting of the shareholders of the Company on 28th March, 1946, to consider a requisition received from Suraj Mukhi and Madan Lal cancelling some of the special resolutions passed at the meeting held on 16th October, 1945. No notice of this meeting was given to Ladli Prasad. At the meeting held on 28th March, 1946—in the absence of Ladli Prasad—several resolutions were passed to the effect that, all amendments made in the Articles of Association by the resolutions dated 16th October, 1945, do stand cancelled and the original Articles of Association of the year 1941 (including Article 47 which authorised the Company by a 2/3rd majority to expel any member) do stand restored. It was also resolved that Ladli Prasad be removed from the Directorate and Chairmanship of the Company, and in his place Suraj Mukhi be appointed Director of the Company at a remuneration of Rs. 900 per month; that Shanti Prasad be appointed Managing Director for ten years, such appointment not being liable to termination earlier by the members; and that Shanti Prasad do receive in addition to his remuneration as Director Rs. 1,000 per month as Managing Director, a travelling allowance of Rs. 30 per day and a motor-car allowance of Rs. 200 per month.

Coming to know about these amendments, Ladli Prasad called upon Shanti Prasad and the other members of the Company to rescind the resolutions, and failing to induce them to comply with the requisition, he filed a petition on 1st May, 1946, in the High Court of Judicature at Lahore for an order for winding up the Company. An order for winding up the Company was passed by a single Judge, but was set aside in appeal by the High Court of Lahore by its order dated 19th January, 1956.

On 26th November, 1946, Ladli Prasad filed a suit in the Court of the Senior Subordinate Judge, Karnal, for a declaration that the meeting and proceedings of the Board of Directors dated 3rd March, 1946, and the extra-ordinary general meeting dated 28th March, 1946, and all meetings of the Directors held after 28th March, 1946, were illegal, *ultra vires*, ineffective and operated as a fraud on the Company and the interests of minority members of the Company and that the unanimous resolutions of the extra-ordinary general meeting dated 16th October, 1945, continued to remain in force and were still operative, and a permanent injunction restraining the Company, Shanti Prasad, Suraj Mukhi, Sajjan Lal and Madan Lal (who were impleaded respectively as defendants 1 to 5) from acting upon or carrying into effect the resolutions passed in the meetings dated 3rd March, 1946 and 28th March, 1946 and all meetings held after 28th March, 1946.

The defendants by separate written statements resisted the suit contending *inter alia* that the defendants 2 to 5 were coerced by Ladli Prasad taking advantage of his position, into passing the resolutions in the extra-ordinary general meeting dated 16th October, 1945, and that the resolutions were not binding upon the Company and the other defendants.

The Subordinate Judge raised a large number of issues the first of which related to the challenge to the validity of the resolution dated 16th October, 1945, raised by the defendants on the ground that it was procured by coercion and undue influence. Even though the burden of proving the first issue which was substantially the central issue in the suit was laid upon the defendants, they did not attend the Court for examination as witnesses. By his judgment dated 25th May, 1953, the Subordinate Judge observed that the written statement did not contain any 'substantial particulars of the plea of coercion or undue influence' and that the defendants having failed to submit themselves to give evidence in support of their plea of coercion or undue influence despite several opportunities given in that connection, a

strong presumption arose against the defendants, that viewed in the context of the resolution dated 20th February, 1945, passed by the defendants, and the subsequent litigation which ensued between the parties, and the fact that the resolutions dated 16th October, 1945, were acquiesced in by the defendants and were never attempted to be avoided by resort to a competent Court, and even the allegation that they were improperly procured was made for the first time in the written statement in the suit before him, the plea of undue influence and coercion was not substantiated; and that the resolutions dated 16th October, 1945, were not invalid. He further held that the resolutions passed at the Directors' meeting dated 3rd March, 1946, and at the extra-ordinary general meeting on 28th March, 1946, were unauthorised and invalid; that by holding the meeting on 28th March, 1946, in breach of the Articles of Association and the resolutions dated 16th October, 1945, it was intended to play a fraud on Ladli Prasad by committing a clear breach of the contract; and that the matter agitated by the plaint did not relate to the internal management of the Company. The learned Judge accordingly granted the relief claimed by the plaintiff for declaration and injunction.

In appeal by the defendants, the District Judge, Karnal, held that Ladli Prasad was in a position to dominate the will of defendants 2 to 5 "who were in a helpless position, being hard hit by the lack of" adequate financial resources, that they were under pressure exercised by the plaintiff induced to give their consent to the resolutions in the meeting held on 16th October, 1945, and on that account the resolutions were ineffective. He observed that Ladli Prasad took undue advantage of his dominating position *qua* the affairs of the Company and compelled the defendants 2 to 5 to pass the resolutions and thereby obtained an unfair advantage, in that he was absolved from all liability incurred by him in the course of his management prior to the meeting held on 16th October, 1945, and that he obtained 'a power of veto over the affairs and smooth running of the business of the Company.' The District Judge agreed with the trial Court that no proper notice was served upon Ladli Prasad of the meetings held on 3rd March, 1946 and 28th March, 1946, and therefore the resolutions at those meetings were not binding upon Ladli Prasad and that in any event the resolutions of those dates were 'a fraud on the minority rights' and were illegal and *ultra vires* but as the plaintiff Ladli Prasad had filed his suit relying on the resolution dated 16th October, 1945, which was invalid, no relief could be awarded to him.

In appeal against the decree of the District Judge dismissing the suit filed by Ladli Prasad, Bishan Narain, J., of the High Court of Punjab observed that the findings of the District Judge "travelled far beyond the pleadings" and only two facts which were pleaded were proved by the evidence *viz.*, that the High Court of Lahore had stayed the order of the Subordinate Judge appointing Receivers of the affairs of the Company and that Ladli Prasad was the eldest male member. The learned Judge on a review of the evidence found that Ladli Prasad was not in a position to dominate the will of defendants 2 to 5 when the resolutions dated 16th October, 1945, were passed and they were the result of a compromise unanimously accepted, and were binding on the parties. He confirmed the view of the trial Court and the District Judge that the resolutions dated 3rd March, 1946 and 28th March, 1946, were invalid because no notice was given to Ladli Prasad of the proceedings, and in the light of his findings, granted a decree for declaration and injunction as prayed but subject to the proviso that the decree shall not affect the rights and liabilities of third parties who were not members of the Company, unless thereby the rights of the plaintiff Ladli Prasad, and the Company were adversely affected.

Against this judgment an appeal was preferred by the defendants with leave under clause 10 of the Letters Patent. In appeal the Division Bench of the High Court reversed the decree passed by Bishan Narain, J., and dismissed the suit filed by Ladli Prasad. In the view of the High Court Ladli Prasad as the elder brother of Shanti Prasad and uncle of Sajjan Lal and Madan Lal was in a position to dominate their will and availing himself of that position he obtained an unfair advantage

over them and that the failure of Shanti Prasad to submit himself to examination before the Court in support of his case though improper could not be considered as fatal to a decision in favour of the defendants. They observed :

" I feel convinced that Ladli Prasad was throughout in a position of commanding influence over his brother and younger nephews, and in consequence thereof, he benefited himself very substantially. This superiority and position of vantage that he occupied continued upto and even after the 16th October, 1945. Under the circumstances, it was for him to rebut the presumption that the benefits which he had thus obtained did not stem from his undue influence, but had been given by the defendants freely and without any pressure, or coercion."

They also observed that Ladli Prasad was in a position to dominate the will of defendants 2 to 5 and had obtained unconscionable advantage over them, and it was for Ladli Prasad to establish that the resolution dated 16th October, 1945, was not vitiated on account of undue influence and this Ladli Prasad has failed to establish. They summarised their conclusions on the issue of undue influence as follows :—

" To sum up, the conclusion of the District Judge on the first issue to the effect that the resolutions mentioned in para 6 of the plaint and passed at the Extra-ordinary General Meeting, dated the 16th October, 1945, were ineffective as having been passed under undue influence, was a finding of fact; and this conclusion had been arrived at after a review of the evidence placed on the record and after having surveyed the facts and circumstances of the case. This finding was not based either on misconception of evidence or by adopting a procedure contrary to law. Such evidence as there is on the record, the history of the business from its very inception till the final disputes between the parties, their relationship *inter se*, and the manner in which the plaintiff derived benefit for himself, and the circumstances of the case go to show :

(a) that the plaintiff was in a position to dominate the will of the defendants and used that position to obtain unfair advantage for himself over the other ;

(b) that he held an authority over them which was real and apparent by dint of his being formerly a *karta* and later on an elder brother in *loco parentis*. He stood in a fiduciary relation to the other standing in a position of active confidence ;

(c) that the plaintiff in consequence of the resolutions passed on the 16th of October, 1945 obtained for himself unfair advantage to their serious detriment by virtue of his position to dominance and the transactions entered into on 16th October, 1945, appear to be unconscionable ; and

(d) that the burden of proof that the transactions were not induced by undue influence was upon the plaintiff, he being in a position to dominate the will of others which he failed to discharge."

On the other issues they held that the proceedings of the resolutions in the meetings dated 3rd March, 1946 and 28th March, 1946, were not binding upon Ladli Prasad but the claim made by Ladli Prasad for a permanent injunction could not be entertained because " equity declines to lend its aid to a person whose conduct has been inequitable in relation to the subject-matter of the suit and that if the prayer of Ladli Prasad was granted it would result in a deadlock and the Company's working and affairs would come to a standstill necessitating the winding up of the Company." They suggested that it was open to Ladli Prasad to seek relief available to him under section 155 of the Indian Companies Act, 1956, and it was open to Ladli Prasad to invoke the powers of the Court or of the Central Government under the Indian Companies Act, if so advised, but the High Court would not, having regard to the apprehension of an immediate deadlock, be justified in issuing a permanent injunction claimed by him in the suit.

With certificate of fitness granted by the High Court under Article 133 (1) (a) of the Constitution this appeal is preferred. Two questions arise at the threshold in this appeal :—

(1) Whether it was competent to the High Court to grant a certificate under Article 133 (1) (a) or (b) of the Constitution; and

(2) Whether in reversing the decree of the District Judge, Bishan Narain, J., transgressed the restrictions imposed upon the powers of the High Court by section 100 of the Code of Civil Procedure.

Article 133 (1), in so far as it is material, provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the territory of India if the High Court certifies—

(a) that the amount or value of the subject-matter of the dispute in the Court of first instance and still in dispute on appeal was and is not less than twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law; or

(b) that the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value; or

(c) that the case is a fit one for appeal to the Supreme Court;

and, where the judgment, decree or final order appealed from affirms the decision of the Court immediately below in any case other than a case referred to in sub-clause (c), if the High Court further certified that the appeal involves some substantial question of law.

The High Court has not certified the case under sub-clause (c) of Article 133 (1). There is also no dispute that the judgment of the High Court involves directly some claim or question respecting property of the value exceeding twenty thousand rupees. The Attorney-General, however, contended that the judgment of the High Court against which this appeal is preferred affirms the decision of the Court immediately below and the appeal does not involve any substantial question of law and therefore the High Court was not competent to grant the certificate under Article 133 (1) (a) and (b). It is urged that an appeal against the judgment of a single Judge to a Division Bench under clause 10 of the Letters Patent is a 'domestic appeal' within the High Court and in deciding whether the decree of a Division Bench in an appeal under the Letters Patent from a decision of a Single Judge exercising appellate jurisdiction affirms the decision of the Court immediately below, regard must be had to the decree of the Court subordinate to the High Court against the decision of which appeal was preferred to the High Court. In other words, it is contended that in this case the decision of the Court immediately below the Division Bench was the decision of the District Judge and not of Bishan Narain, J: this it is contended is so, because the expression 'Court immediately below' used in the Constitution means 'Court subordinate' and a Single Judge of the High Court not being a Court subordinate to the Division Bench *qua* the Division Bench the District Court was the Court immediately below. But the two expressions have not the same meaning. A Court subordinate to the High Court is a Court subject to the superintendence of the High Court, whereas a Court immediately below is the Court from whose decision the appeal has been filed. If the two expressions are equated, the right of appeal against the decree of the High Court sitting in appeal over the decision of a Single Judge exercising original jurisdiction would be severely restricted for in such an appeal whether the judgment is of affirmation or reversal, the High Court can certify a case under Article 133 (1) clauses (a) and (b) only if the appeal involves a substantial question of law. The Attorney-General, however, concedes and in our judgment properly that there has been a long standing practice which has the approval of the Privy Council (see *Tulsi Prasad v. Benayek*¹, that if the decree or order of the Division Bench reverses the judgment of a Single Judge trying a suit or proceeding in exercise of original jurisdiction of the High Court and the condition as to valuation is satisfied, an appeal lies as a matter of course, *i.e.*, without satisfying the condition that it involves a substantial question of law. This view can be justified only if a Single Judge of a High Court trying a suit or proceeding in exercise of the original jurisdiction is a Court immediately below the Division Bench of the High Court which decides an appeal from his decision. The right to appeal against the judgment of a Single Judge whether exercising original jurisdiction or exercising appellate jurisdiction to a Division Bench is governed by the same clause of the Letters Patent. If for certifying a case for appeal to this Court in a proceeding tried in exercise of the original jurisdiction the judgment of a Single Judge is to be regarded as the decision of the Court immediately below a Division Bench to which an appeal is filed under the Letters Patent, it is difficult to discover any logical ground for holding that the judgment

1. L.R. 23 I.A. 102.

of a Single Judge in exercise of appellate jurisdiction is not such a decision. Clause 10 of the Letters Patent of the Lahore High Court (which continues to apply to the Punjab High Court) provides, in so far as it is material :—

“ And we do further ordain that an appeal shall lie to the said High Court of Judicature * * * from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court * * *) of one Judge of the said High Court * * * and that notwithstanding anything hereinbefore provided an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court * * * in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal ; * * * ”

Manifestly the clause confers an unqualified right of appeal to the High Court from the judgment of a Single Judge exercising original civil jurisdiction. Similarly there is a right of appeal from a judgment of a Single Judge hearing a civil appeal where the judgment is not in an appeal from an appellate decree. But against the judgment of a Single Judge exercising powers in appeal from an appellate decree, an appeal under the Letters Patent only lies if the Judge declares that the case is a fit one for appeal, and not otherwise. There is no warrant for making a distinction between an appeal filed against the judgment of a Single Judge exercising original jurisdiction and a judgment in exercise of appellate jurisdiction. There is nothing in the context to support the plea that the expression ‘ Court immediately below ’ includes a Judge of the High Court trying a proceeding in exercise of original jurisdiction, i.e., sitting as a Court of first instance, but not a Judge exercising appellate jurisdiction. The Constitution in clause (i) (a) of Article 133 has expressly referred to a ‘ Court of first instance ’, in prescribing the condition relating to the value of the subject-matter and if it was intended that for the purpose of deciding whether the judgment of the High Court sought to be appealed against affirmed the decision of the Court immediately below, the decision of a Single Judge was to be ignored, if it was a judgment in exercise of appellate powers, but not when he was exercising original jurisdiction, an appropriate provision in that behalf would have been enacted. In the absence of any such enactment, the expression ‘ Court immediately below ’ in Article 133 (1) must mean the Court from the decision of which an appeal has been filed to the High Court, whether such Court is a Single Judge of the High Court, or a Court subject to the superintendence of the High Court.

In *Wahid-ud-din v. Makhan Lal*¹, a Full Bench of the Lahore High Court (Blacker, J., dissenting) held that for the purposes of section 110 of the Code of Civil Procedure 1908 (which is in material terms identical with Article 133 of the Constitution) a Judge of a High Court sitting to hear not an original proceeding, but as a Court of appeal cannot be considered a ‘ Court immediately below ’ the Bench hearing the Letters Patent appeal from his judgment. Din Mohammad, J., delivering the principal judgment of the Court observed at page 247 :

“ Wherever any provision is made for an appeal to the High Court, it is the High Court as such that is contemplated and not the Court of any individual Judge or a combination of different Judges. It is only for the sake of convenience or facility of disposal that some cases are required to be heard by one Judge and some by more Judges than one. The Court accordingly continues to be the same even if by any domestic arrangement an appeal from one Judge lies to a Bench of two Judges and must be taken to be the High Court in either case. * * * It is obvious that the authorities dealing with a Judge of the High Court in the exercise of his original jurisdiction can render no assistance in the disposal of this matter and it was for this reason that this distinction was emphasized when the question was formulated. A Judge sitting on the original side is merely discharging the functions of a trial Court and to all intents and purposes, therefore, he is a Court of first instance and when an appeal is lodged against his order, as a Court he is immediately below the Court which hears the appeal. Such an appeal is provided for even in the Code of Civil Procedure itself as an appeal from an original decree. This, however, is not the case when the same Judge sits on the appellate side and for the purposes of that appeal is the High Court in himself. Neither the Civil Procedure Code nor the Punjab Courts Act contemplates an appeal to another Court from an order made in the High Court whether by one Judge or more than one and consequently the same analogy cannot apply.”

The learned Judge further observed :

"I cannot reconcile myself to the position that a Judge sitting alone can be characterised as a tribunal inferior to the Letters Patent Bench, merely because the Bench has power to modify or reverse his judgment. It is not with an idea of implying any subordination of the Court of the Single Judge to the Letters Patent Bench that such an appeal is provided for by Letters Patent, it is merely with a view to provide a further safeguard in the interests of the litigant that the domestic rules framed by the High Court permit a case to be heard by a Judge sitting alone."

Abdur Rahman, J., agreeing with Din Mohammad, J., observed :

"* * * when a suit or proceeding is decided on the original side, it cannot but be held to have been disposed of by the Court of first instance and should be of the value of ten thousand rupees or upwards before an appeal can be taken to the Privy Council under the first paragraph of section 110. It is this Court of first instance which would usually be covered by the expression "the Court immediately below" used in the latter part of that section. * * * Different considerations might prevail in construing the expressions "the Court of first instance" and "the Court immediately below" when "the Court immediately below" does not happen to be the Court of the first instance but as long as they are the same the decision of the Court of first instance whether it is by a Subordinate Judge, a District Judge or a Judge of the High Court on its original side, where such a side exists, must be held to have been given by a Court immediately below the Court which affirms or upsets that decision on appeal. Viewed thus a Judge of a High Court sitting on the original side will be the Court immediately below the Court hearing an appeal from his decision. But the same cannot be said of a Single Judge sitting on the appellate side who is never "a Court of first instance" and cannot therefore be correctly described to have been presiding over the Court immediately below the Court hearing an appeal from his judgment under the Letters Patent."

We are unable to agree, for reasons already set out, with the view expressed by the learned Judges of the Lahore High Court. There is nothing in the phraseology used or the context which justifies the view that the expression 'the Court immediately below' is used in section 110 of Code of Civil Procedure or in Article 133 (1) of the Constitution in two different senses, according as the Court is trying a proceeding in exercise of its original jurisdiction and in exercise of its appellate jurisdiction.

There is a decision of the Calcutta High Court in *Debendra Nath Das v. Bibudhendra Mansingh*¹, decided by Jenkins, C.J., and N.R. Chatterjee, J., which has expressed a similar view. The learned Chief Justice in delivering the judgment of the Court observed at page 93 :

"It only remains to be seen whether as regards nature the requirements of section 110 are fulfilled. The Court of first instance as well as the lower Appellate Court decided adversely to the present applicant. On appeal to the High Court, a Single Judge reversed the decree of the lower Appellate Court. From this judgment of a Single Judge there was an appeal to the High Court under clause 15 of the Charter with the result that the judgment of the Single Judge was reversed by a Bench of two Judges. It will thus be seen that the first judgment of the High Court reversed the decree of the Court immediately below, but that this reversal was afterwards in effect cancelled with the result that the only effective judgment of the High Court affirmed the decision of the Court immediately below (section 110, Civil Procedure Code)."

The view appears *prima facie* to support the contention that in considering whether within the meaning of Article 133 (1) of the Constitution judgment of the Court immediately below the High Court is affirmed, the judgment of the Judge of the High Court trying the proceeding as a Court of appellate jurisdiction must be ignored. Any expression of opinion by the eminent Chief Justice would always be considered with the greatest deference and respect. It must, however, be stated that the observations of the learned Chief Justice were in the nature of *obiter dicta*, because in the view of the Court, the test of pecuniary valuation was satisfied and in the appeal a substantial question of law was involved, and on that account the Court was bound to certify the case. It was therefore strictly not necessary to consider whether the judgment affirmed the decision of the Court immediately below. It must also be observed that the learned Chief Justice equated the expression "Court immediately below" with the expression "Court subordinate" used in section 115 of the Code of Civil Procedure. That is clear from the observations made by him

"that a Judge sitting alone is not a Court subordinate to the High Court, but performs a function directed to be performed by the High Court (clause 36, Letters patent). And thus no decision of a Single Judge can be revised under section 115 of the Code."

But as we have already pointed out the test for determining the right to appeal is not whether the judgment is of a Court subordinate, but whether the judgment is of a Court immediately below. The two expressions being different, the same considerations do not apply in their interpretation. A similar view was also expressed in a very recent judgment by the Andhra Pradesh High Court decided on 18th August, 1961: *Vadiapalla Marayya and another v. Vallabhaneni Buchiramayya and others*¹, (which has not yet been officially reported).

There are however two earlier judgments of the Lahore High Court which have expressed a contrary view. *Minna Heatherly and others v. B.C. Sen & others*² and *Gopal Lal v. Balkissan*³. In these two cases it was held that a Single Judge of the High Court hearing an appeal is within the meaning of section 110 of the Code of Civil Procedure, 1908, a Court immediately below the Division Bench of the High Court hearing an appeal under the Letters Patent. The High Court of Nagpur in *Kishanlal Nandlal and another v. Vithal Nagayya*⁴, has preferred the earlier view of the Lahore High Court.

In our judgment the appeal with certificate granted by the High Court under Article 133 (1) (a) and (b) is competent, because a Single Judge of the High Court hearing either a proceeding as a Court of original jurisdiction or in exercise of appellate jurisdiction is a Court immediately below the Division Bench which hears an appeal against his judgment under the relevant clause of the Letters Patent.

Bishen Narain, J., was, it is true, hearing an appeal from an appellate decree and his powers were restricted, for a Second Appeal lies to the High Court only on the following grounds, namely :—

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

Whether a particular transaction was vitiated on the ground of undue influence is primarily a decision on a question of fact. In *Satgur Prasad v. Har Narain Das*⁵, the Privy Council held that in a suit to set aside a deed on the ground that it was procured by undue influence and fraud, the finding that it was so procured is a finding of fact and is not liable to be re-opened if fairly tried. Under the Civil Procedure Code, a Second Appeal does not lie to the High Court, except on the grounds specified in the relevant provision of the Code, prescribing the right to prefer a Second Appeal, and the High Court has no jurisdiction to entertain a second appeal "on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be" (*Mussummat Durga Choudhrai v. Jawahir Singh Choudhri*⁶). But the challenge before Bishen Narain, J., to the decision of the District Judge was founded not on the plea that appreciation of evidence was erroneous, but that there were no adequate particulars of the plea of undue influence, that the particulars of facts on which undue influence was held established by the District Judge were never set up, that there was no evidence in support of the finding of the District Judge and that burden of proof on a misconception of the real nature of the dispute was wrongly placed on the plaintiff. A decision of the first appellate Court reached after placing the onus wrongly or based on no evidence, or where there has been substantial error or defect in the procedure, producing error or defect in the decision of the case on the merits, is not conclusive and a Second Appeal lies to the High Court against that decision.

Order 6, rule 4 of the Code of Civil Procedure provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful

1. (1962) 1 An.W.R. 46.

2. A.I.R. (1927) Lah. 537.

3. I.L.R. 13 Lah. 338.

4. I.L.R. (1955) Nag. 821.

5. L.R. 59 I.A. 147 : 62 M.L.J. 41.

6. L.R. 17 I.A. 122.

default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the Forms in the Appendix, particulars (with dates and items if necessary) shall be stated in the pleading. The reason of the rule is obvious. A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence; and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up.

In *Bharat Dharma Syndicate v. Harish Chandra*¹, the Privy Council emphasized the necessity of particulars in the following terms :

" Their Lordships desire to call attention to the great difficulty which is occasioned both to persons charged with fraud or other improper conduct, and to the tribunals which are called upon to decide such issues, if the litigant who prefers the charges is not compelled to place on record precise and specific details of those charges. In the present case, the petitioner ought not to have been allowed to proceed with his petition and seek to prove fraud, unless and until he had, upon such terms as the Court thought fit to impose, amended his petition by including therein full particulars of the allegations which he intended to prove. Such cases as the present will be much simplified if this practice is strictly observed and insisted upon by the Court, even if, as in the present case, no objection is taken on behalf of the parties who are interested in disproving the accusations. "

Similarly this Court in *Bishnudeo Narain and another v. Seogeni Rai and Jagernath*², in dealing with the practice to be followed in a case where a plea of undue influence and coercion is raised, observed at page 556 :

" It is also to be observed that no proper particulars have been furnished. Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any Court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. "

The plea of undue influence and coercion by the Company and defendants 2 to 5 was raised in terms which were identical. The plea analysed in its component parts may be stated as follows :—

(1) Because of the resolution, dated 16th October, 1945, the plaintiff "succeeded in getting dictatorial powers over the Company, practically usurping all the powers of the General body of the shareholders and thereby purporting to deprive them to exercise even those rights which they "were legally entitled to exercise under the law" ;

(2) "These resolutions which gave the plaintiff a complete veto over the affairs of the Company (which is not permissible under any valid constitution) were obtained by the plaintiff at the point of a dagger" ;

(3) "That the plaintiff was refusing to hand over charge of the moneys, books and the entire assets of the Company and using the funds of the Company for ruinous litigation against the defendants who on the other hand were having to prosecute their cases out of their meagre funds which too were dwindling fast ; "

(4) "Taking full advantage of his position and knowing fully well the resources of the defendants, the plaintiff succeeded in coercing the defendants in submitting to his dictations and virtually compelled them to pass these unconstitutional resolutions. "

1. L.R. 64 I.A. 146.

2. (1951) S.C.J. 413 : (1951) S.C.R. 548 (556).

It may be observed that though Issue No. 1 raised a plea both of coercion and undue influence as vitiating the resolutions, no attempt was made to rest the right to relief on a case of coercion in the Courts below and in this Court.

The first part of the case of the defendants amounts to a plea that by the resolutions dated 16th October, 1945, the plaintiff acquired a position of domination over the affairs of the Company and over the defendants. What the second part means it is difficult to appreciate. The language used is somewhat extravagant: It is not the case of the defendants that they were compelled to agree to the resolution by threats of physical violence. By the third part it is affirmed that the plaintiff unlawfully refused to part with the moneys, books and the assets of the Company and commenced litigation with the aid of the funds of the Company whereas the defendants had to rely upon their own resources which were limited. Presumably this has reference to the refusal of the plaintiff to comply with the resolution of 20th February, 1945, and to litigation which ensued between the parties after the resolution was passed. It is difficult to regard this as a plea precisely expressing that the plaintiff was in a position to dominate the will of the defendants. The last part of the plea is that taking advantage of his position and knowing that the position of the defendants was precarious he succeeded in compelling the defendants to submit to his dictation and compelled them to pass the resolutions.

The pleading which was regarded as one of undue influence also suffers from a lack of particulars. How the plaintiff took advantage of his position as a person in possession of the assets of the Company and by what device he compelled the defendants to submit to his will has not been stated. Section 16 of the Indian Contract Act, which incorporates the law relating to undue influence in its application to contracts is but a particularisation of a larger principle. All transactions procured in the manner set out therein, are regarded as procured by the exercise of undue influence. Section 16 of the Contract Act provides :

"(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other ; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872."

The doctrine of undue influence under the Common Law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence spiritual and temporal. The doctrine applies to acts of bounty as well as to other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another. The Indian enactment is founded substantially on the rules of English Common Law. The first sub-section of section 16 lays down the principle in general terms. By sub-section (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled. Sub-section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. The reason for the rule in the third sub-section is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence.

A transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the

will of the other and he uses his position to obtain an unfair advantage over the other. It is manifest that both the conditions have ordinarily to be established by the person seeking to avoid the transaction: he has to prove that the other party to a transaction was in a position to dominate his will and that the other party had obtained an unfair advantage by using that position. Clause (2) lays down a special presumption that a person is deemed to be in a position to dominate the will of another where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other or where he enters into a transaction with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Where it is proved that a person is in a position to dominate the will of another (such proof being furnished either by evidence or by the presumption arising under sub-section (2) and he enters into a transaction with that other person which on the face of it or on the evidence adduced, appears to be unconscionable the burden of proving that the transaction was not induced by undue influence lies upon the person in a position to dominate the will of the other. But sub-section (3) has manifestly a limited application: the presumption will only arise if it is established by evidence that the party who had obtained the benefit of a transaction was in a position to dominate the will of the other and that the transaction is shown to be unconscionable. If either of these two conditions is not fulfilled the presumption of undue influence will not arise and burden will not shift.

Assuming that in this case a plea of undue influence was attempted to be raised by paragraph 4 of the Company's written statement and paragraph 6 of the written statement of the other defendants, defendants 2 to 5 have not submitted themselves for examination before the Court. The burden of proving undue influence primarily lay upon the defendants who were setting up the plea. The manner in which the case on behalf of the defendants was conducted reflects little credit upon those in charge of the case. The primary issue on which the defendants sought to defend the suit raised the plea of undue influence and coercion in relation to the resolution dated 16th October, 1945, and we should have expected the defendants to open the case and lead evidence in support of their plea. But on 11th December, 1950, after the second defendant Shanti Prasad produced a number of documents which he was summoned to produce, the plaintiff for some reason not apparent on the record opened the case. Counsel for the plaintiff stated that the plaintiff was at that stage to be examined only on the issue of which the onus lay upon the plaintiff and that the plaintiff would be examined in rebuttal after the defendants closed their case and that he will examine the remaining witnesses mentioned in his list in rebuttal. Manifestly at that stage the evidence of the plaintiff led expressly on issues other than the first issue of undue influence, could not be directed to rebutting any presumption of undue influence, for there was before the Court no evidence proving the facts on the proof of which alone the presumption under sub-section (3) of section 16 may arise and the burden of proof shift. After the plaintiff concluded his evidence on the issues on which the plaintiff offered to lead evidence, on behalf of the defendants two witnesses Mohan Singh and Raghu Nandan were examined. Mohan Singh said nothing which might have a bearing on the plea of undue influence. Raghu Nandan made certain equivocal statements about examination of accounts at the meeting of 16th October, 1945 and further stated that the compromise pursuant to which the resolutions were passed was arrived at about midnight of the 15th October, at the residence of the plaintiff Ladli Prasad, and that to his knowledge the defendants had no other source of income except the director's remuneration. Beyond this he appears to have said nothing which directly supported the defendant's case of undue influence. Thereafter followed a baffling series of applications made with a view to protract the proceeding in the suit, presumably to procure a situation in which the principal defendant Shanti Prasad may avoid going into the witness box. By diverse applications the proceeding was protracted till May, 1958, but neither Shanti Prasad nor the other members of the family appeared before the Court for examination as witnesses in support of the defendant's case of undue influence. An application submitted on 27th April, 1953,

after the case was set down for judgment for the examination of Shanti Prasad was rightly rejected by the Subordinate Judge. A bare perusal of the statements and the course which the proceedings have taken leads to the only conclusion that the defendants did not desire to give evidence in support of their plea of undue influence and to subject themselves to cross-examination. There may arise cases in which even though the burden lies on the defendants to prove their case of undue influence they may establish it from admissions made by the plaintiff or his witnesses or from other evidence, and without giving their own testimony, but this, in our judgment, is not such a case.

Before directing our attention to the findings of the District Judge from which undue influence was inferred, it is necessary to reiterate certain undisputed facts. Ladli Prasad was the eldest male member in the family but the family had severed its joint status on 1940 and the business of the family was taken over by a private limited company, in which the three branches held shares. Under the Articles of Association as originally framed in 1941, Ladli Prasad was drawing from the Company an allowance of Rs. 1,800 per mensem, a commission of $7\frac{1}{2}\%$ on the net profits of the Company and the car allowance of Rs. 250 per mensem and an allowance of Rs. 30 per day during tours together with a new car every third year for use, whereas the other directors were getting only Rs. 250 per mensem, and Rs. 25 for every meeting of directors attended. Defendants 2 to 5 revolted against this disparity in the scale of remuneration and by resolution dated 20th February, 1945, removed Ladli Prasad from the Managing Directorship of the Company. This step of the defendants led to litigation. Shanti Prasad claimed to enforce his rights under the resolution, and Ladli Prasad sought to retain possession asserting that the resolution was invalid. There were thereafter negotiations for settlement of the disputes, at which several near relations and employees of the Company were present, and certain terms of compromise were agreed upon pursuant to which in the meeting dated 16th October, 1945, held at the residence of Ladli Prasad resolutions were passed, which had the effect of equalising the share holding of the three branches, and the remuneration drawn by them. Ladli Prasad was also given complete discharge from liability for his previous dealings, resolutions of 20th February, 1945, were cancelled, and amendments were made in the Articles of Association requiring that all decisions of the Board of Directors shall be unanimous. Thereafter by the special resolution passed in the Extra-ordinary General Meeting dated 29th March, 1946, the resolutions dated 16th October, 1945, were cancelled, the plaintiff—Ladli Prasad—was removed from his post of Chairman, and also of Director, and Shanti Prasad was appointed Managing Director. The resolutions dated 16th October, 1945, were acted upon, equalisation of share holding was effected by transfer of shares, and Shanti Prasad assumed the office of Manager of the Company, and presumably dividend declared at the meeting and remuneration settled were accepted. The defendants did not institute any proceeding to have the resolutions declared null and void on the ground that they had been secured by undue influence, and the plea that they were invalid was set up for the first time in the suit instituted by the plaintiff.

In support of his conclusion that undue influence was exercised by the plaintiff upon defendants 2, 4 and 5, the District Judge recorded the findings that the plaintiff was the eldest male member of the family, and there was no one to look after the interests of defendants 2 to 5; that the plaintiff had taken into his possession all the jewellery belonging to defendants 2 to 5 and this jewellery was restored to them after the compromise of 16th October, 1945; that after the joint family was dissolved and the business of Kishori Lal & Sons was taken over by the Company, plaintiff received as much as Rs. 3,000 per month as salary, daily allowance, motor-car allowance and under other miscellaneous heads, whereas the other Directors received only an allowance of Rs. 250 per month and a fee of Rs. 25 per day for attending the meetings of the Board of Directors; that the plaintiff had started another Company in the name of Jagatjit Distilling and allied Industries, Hamira

from which he made large profits and had "become a business magnate"; that at the time of the compromise the financial position of the defendants was "helpless and miserable" and they were not doing any other business and has no other source of income. After the operation of the order appointing Receivers passed by the Subordinate Judge, Karnal was stayed by the High Court of Lahore, defendants 2 to 5 were not in a position to defend their rights because of lack of financial resources and the plaintiff took advantage of their helplessness and dictated terms which were not fair; and that the plaintiff was interested in creating a deadlock and thereby to make large profits from his separate concerns—the Jagatjit Distilling and Allied Industries. The District Judge inferred from these findings that the plaintiff Ladli Prasad was in a position to dominate the will of defendants 2 to 5, that he could exert undue influence upon them because "they were in a very wretched position being hard pressed by the lack of money"; that the near relations of the family were present at the meeting to protect the interests of the family and they could not be expected to safeguard the interest of defendants 2 to 5; and that there was no evidence that defendants 2 to 5 received advice from any one else; or that they gave their consent to the compromise with free exercise of their volition. He held that the plaintiff got himself absolved from all liability to account for his dealings with the assets of the Company since he commenced management as a Managing Director, and that he "obtained by the resolution a power of veto" and managed to get himself appointed a permanent Director. The learned Judge, therefore, concluded relying upon the "presumption of undue influence on account of the above-mentioned facts" that the defendants 2 to 5 were induced by the exercise of undue influence and coercion to give their consent to the minutes of the meeting held on 16th October, 1945, and the plaintiff had failed to adduce any satisfactory evidence to rebut the presumption.

In our view the conclusions of the District Judge could not be regarded as binding upon the High Court in Second Appeal, for he raised the inference of undue influence from facts which were never pleaded and proved, and he relied upon the presumption under section 16 (3) without the conditions prescribed thereby being fulfilled. The only facts on which the defendants relied in support of their plea in their written statement were that the plaintiff was in possession of the books and assets of the Company; that he used the funds of the Company for litigation, and that taking full advantage of his position the plaintiff succeeded in coercing the defendants to submit to his dictation. The first averment was admitted and the other two were denied by the plaintiff. There is no plea and no evidence on the record to prove that there was no one to look after the interest of defendants 2 to 5 that all the jewellery of the defendants was prior to 16th October, 1945, in the possession of the plaintiff; that the plaintiff had made large profits from Jagatjit Distilling and Allied Industries; that the plaintiff was interested in creating a deadlock with a view to secure benefit for his concern Jagatjit Distiller; that the financial position of the defendants was "helpless and miserable"; that the defendants were not in a position to defend their rights because of lack of financial resources, and the plaintiff on that account dictated terms of compromise which were not fair. Again the presumption under section 16 (3) could not come to the aid of the defendants. The two conditions on the proof of which alone the presumption arises are that the plaintiff was in a position to dominate the will of the defendants, and the transaction was unconscionable. It was not pleaded by the defendants that as the eldest male member of the family, the plaintiff was in a position to dominate the will of the defendants; nor was there evidence to show that he held any real or apparent authority over the defendants on that account. Admittedly on 20th February, 1945, the defendants had by a resolution of the Company removed the plaintiff from the post of Managing Director. It is true that the plaintiff refused to accept the validity of that resolution, and declined to hand over management of the affairs of the Company to Shanti Prasad; but that does not establish that he was in a position to dominate the will of the defendants. Again the transaction cannot be called unconscionable. The plaintiff Ladli Prasad was under the original appointment drawing an allowance exceeding Rs. 3000 per month and held the largest single block of

shares and occupied the office of Managing Director. By the resolution his remuneration was reduced to Rs. 900, he was deprived of his office of Managing Director and his share-holding was also reduced and made equal to that of the other branches of the family. It is true that he became Chairman of the Board of Directors, but on that account he acquired no superior rights. All resolutions of the Board of Directors had under the amended Articles to be unanimous and no member could be removed by the others. These resolutions operated as much to the benefit of the defendants 2 to 5 as of the plaintiff. It is true that by the resolutions passed at the meeting all previous dealings of the plaintiff were validated and he was absolved from liability in respect of those transactions. The plaintiff has affirmed on oath that this was so because accounts were 'gone into' before the meeting, and the defendants have not entered the witness box to depose to the contrary, though the burden of proving that unfair advantage was obtained by the plaintiff lay upon them. Undoubtedly a resolution which absolved the plaintiff from liability for all his past dealings, without settling accounts, may appear *prima facie* unfair, but the District Judge did not hold that accounts were not scrutinised before the resolutions of 16th October, 1945, were passed. In any event there is no evidence on the record that accounts were not scrutinised and accepted by the defendants 2 to 5 before the compromise which culminated in the impugned resolutions. The only evidence on behalf of the defendants was of Raghu Nandan—Works Manager of the Karnal Distillery. He stated:

"the compromise was finalised at about 12 and 1 A.M. at night. I stayed outside for some time, but at the time of finalising of the compromise, I was present at the place where the compromise had taken place. The accounts were gone into at that time. So far as I know accounts were never sent for during the talk of compromise.S. P. Jaiswal insisted on seeing the accounts, but abruptly he signed the compromise."

In cross-examination he stated:

"I do not know if parties had been carrying on the negotiations about the compromise some 5 or 6 days before same was arrived at, but I know that they were there on the 15th. I do not know when the compromise (talks) started. The compromise was finalised between the night of the 15th and 16th, and on the morning of the 16th I was told to take office records to Karnal."

The plaintiff Ladli Prasad has deposed that the accounts were scrutinised before the resolutions. It has to be remembered that in pursuance of the resolutions dated 16th October, 1945, Shanti Prasad assumed the office of Manager of the Company, and it is common ground that the books of account were in his possession since that date. The books were originally under the control of the plaintiff: since the resolutions they were with the defendants and the defendants have not led any evidence to show that in respect of his dealings for the period he was in management the plaintiff Ladli Prasad was liable to the Company.

It cannot in the circumstances be held that the High Court was bound by the findings recorded by the District Judge. For reasons already mentioned the conclusion on the issue of undue influence was based on allegations which were never pleaded and proved, Bishan Narain, J., was therefore right in holding that the findings of the District Judge travelled beyond the pleadings of the defendants and:

"that besides the facts that the plaintiff is the eldest surviving brother and the High Court stayed the operation of the order appointing the Receivers, there is no evidence in support of the findings of the District Judge."

On a review of the evidence which Bishan Narain, J., was entitled in the circumstances to embark upon, he came to the conclusion that the defendants had failed to establish the plea of undue influence. The Division Bench of the High Court in appeal under clause 10 of the Letters Patent held on an elaborate review of the evidence that the conclusion of the District Judge on the issue of undue influence was correct. We must examine the findings recorded by the Division Bench, because the decision that the conclusions of the District Judge were not binding upon Bishan Narain, J., does not effectively dispose of the appeal. This Court must decide whether on the pleading of the defendants and the evidence on the record, the conclusion of the High Court may independently of the findings of the District

Judge be sustained. The High Court observed that as the *karta* and elder brother, the plaintiff Ladli Prasad was in a position to dominate the will of the defendants and that he obtained an unfair advantage over them. In coming to that conclusion the learned Judges relied upon

"the Hindu Shastric injunctions and highly cherished Hindu sentiments that an elder brother in relation to his younger brothers or an uncle in relation to his fatherless nephews is placed on a high pedestal next after parents."

and inferred that the plaintiff must be deemed to be in *loco parentis* to the defendants and that he not only held an authority which is both real and apparent but he stood in a fiduciary relationship and taking advantage of his position he could and did dominate the will of the defendants. The learned Judges recognised that the case of the defendants suffered from the infirmity that they did not offer to be witnesses in the case, but they observed that

"their omission in that behalf though improper could not be considered fatal because having regard to the circumstances, undue influence could be inferred, the plaintiff Ladli Prasad having been in a position of superiority and a position of vantage which he continued to occupy till 16th October, 1945."

In our judgment there is no evidence to support the finding that Ladli Prasad was *qua* the other members in *loco parentis*. The three branches of the family had separated in 1940, and were living apart. It is true that Ladli Prasad was drawing remuneration which was many times the remuneration drawn by the other branches but the validity of the resolutions, under which he commenced drawing that remuneration has never been challenged. By February, 1945, the disputes between Ladli Prasad on the one hand, and the other members had come to a head, and by the resolution dated 20th February, 1945, Ladli Prasad was removed from his office of Managing Director. This was an "open revolt" against whatever authority Ladli Prasad may have once possessed. Shanti Prasad filed a suit against Ladli Prasad to secure custody of the assets of the Company as Managing Director, and obtained an order for appointment of a Receiver of the assets. It would be a complete perversion of the true situation to hold in this case in the light of the circumstances that merely because Ladli Prasad was the eldest male member, he was in '*loco parentis*' *qua* defendants 2 to 5. It may be noticed, that this ground that Ladli Prasad stood in the relation similar to that of a parent *qua* defendants 2, 4 and 5 was never pleaded by the defendants. The defendants were represented by their lawyers in the two suits which were filed since 20th February, 1945, and it is difficult to accept that though litigating in Court in assertion of the rights claimed by them, they were so much under the influence of Ladli Prasad (who at the material time was only about 27 years of age) that they could not secure independent advice. For reasons already mentioned the resolutions were, unless it was established that the plaintiff Ladli Prasad was given a discharge without scrutiny of accounts, not unconscionable. Negotiations for a compromise were carried on for more than five days and several relations of the parties who were obviously interested in defendants 2 to 5 were present. If the plaintiff had attempted to exercise his authority over the defendants some reliable evidence should have been forthcoming in that behalf. The circumstance that none of the defendants gave evidence in support of their plea, even after protracting the proceedings for more than two years raises a strong presumption against them that they realised the infirmity of their case and were not willing to submit themselves to cross-examination.

Raghu Nandan who was practically the only witness examined by the defendant to depose to what transpired at the negotiations and the meeting which culminated in the impugned resolutions has not said anything which may even indirectly support their case. The case that the plaintiff refused to part with the jewellery of the defendants, and on that account was able to compel the defendants, to agree to the resolutions was never pleaded and no evidence was given by the defendants in that behalf. Ladli Prasad deposed that he had some jewellery belonging to the defendants 2 to 5, and that the defendants were in possession of his own jewellery, and after the meeting of 16th October, 1945, the jewellery was exchanged. There is again no evidence that the defendants were at the material

time in financial difficulties. Admittedly partition of joint family assets had taken place, and the different branches had obtained their shares in severalty except in the business. Defendants have also led no evidence as to what their financial resources in 1945 were, and the assumptions made by the High Court in that behalf are not warranted. It is true that because of resolution No. 12 requiring every decision of the Board of Directors to be unanimous, and deletion of Article 47, if the Directors quarrelled, creation of an impasse may be visualised, but by the resolutions the plaintiff acquired no overriding privilege. His rights were the same as of the other branches of the family. On the question as to what transpired at and before the meeting dated 16th October, 1945, there is the evidence of Devi Parshad which may be briefly referred to. He has deposed that he was present at the meeting and that the compromise was arrived at by the free consent of the parties and no undue influence was exercised by any party or the other. The compromise talks had begun a week earlier, and the account books of the Karnal Distillery Company were produced at the time of the compromise, and the books were examined by defendants 2 to 5 and some objections raised during the talks of compromise were settled after seeing the books of account. The witness also produced a copy of the minutes of the meeting which had taken place at 10-30 A.M. on 16th October, 1945, stating that the same were typed by him. There was substantially no cross-examination of this witness on the evidence given by him that the account books were examined during negotiations for compromise. The finding of the High Court that the books of account were never examined and the plaintiff persuaded the defendants to give him a complete discharge in respect of the liabilities incurred by him for his transactions was never pleaded in the written statement, though it was an important particular which if true would have been pleaded. Even assuming that on the general plea of undue influence it was open to the defendants to lead evidence on this matter, the defendants have not chosen to lead any reliable evidence to show that the books of account were not examined and entries were not verified, and the equivocal evidence made by the witness Raghu Nandan has no evidentiary value at all. It is true that the plaintiff had started another Company in the name of Jagatjit Distilling and Allied Industries but even if that circumstance has any bearing on the issue of undue influence there is again little evidence that he had made large profits and had acquired influence and power thereby. The appointment of Receivers by the Court of Subordinate Judge, Karnal was stayed by the High Court, but that single circumstance will not justify an inference that the defendants were effectively prevented from prosecuting their claim. There is no evidence to show that the plaintiff was interested in creating a deadlock so as to prevent the smooth and successful business of the Company.

The only two facts *viz.*, that the plaintiff was the eldest member and that he was before the resolution dated 20th February, 1945, receiving very much larger sums of money from the Company as his remuneration in comparison with the remuneration received by the defendants, viewed in the light of the other circumstances will not justify an inference that the plaintiff was in a position to dominate the will of the defendants. For reasons already stated the High Court was in error in relying upon the presumption under sub-section (3) of section 16, because in our view the evidence does not justify the conclusion that the plaintiff was in a position to dominate the will of the defendants and that the resolutions gave an unconscionable advantage to the plaintiff. We must add that the decisions of the District Court and Division Bench of the High Court, suffered from serious infirmities in that they wrongly placed the onus of proof upon the plaintiff, and reached a conclusion that the plaintiff failed to prove that the resolutions were not obtained by the exercise of undue influence.

It was urged that in any event, at this late stage—sixteen years after the date on which the resolutions were passed by the defendants at the meeting dated 28th March, 1945—this Court would not be justified in declaring the actions of the defendants in pursuance of the resolutions, invalid, for they would affect third parties

who must have dealt with the Company on the footing that the management of the Company had authority to transact business. But the plaintiff has unauthorisedly been deprived of his rights by the arbitrary conduct of the defendants. All the Courts below have held that the resolutions dated 28th March, 1946 are invalid. The High Court declined to grant relief to the plaintiff, for in their view the plaintiff had disintituled himself to equitable relief because of his previous conduct in exercising undue influence, and thereby securing an unfair advantage to which he was not lawfully entitled. It is unnecessary to enter upon a discussion of the question whether in the circumstances it was a sufficient ground for depriving the plaintiff of relief, for we are of opinion that subject to the reservations made by Bishan Narain J., which fully protect third parties, relief should be awarded. Before the learned Judge, counsel for the plaintiff gave an undertaking that he will not question the dealings of the defendants *qua* third parties, and requested expressly that the prayer for declaration that all acts of the Company and the defendants which affected him personally *qua* the members of Company may alone be declared invalid. That, in our judgment, should be sufficient to meet any objection which may be raised by the defendants on the score of delay.

It was also submitted that the plaintiff has lost his right to the shares since the suit was instituted because the Company had enforced its lien and had sold the shares of the plaintiff in enforcement of the lien. The validity of that action of the Company has been challenged in a separate proceeding, and we need express no opinion on that question. All the Courts have come to the conclusion that the resolutions dated 3rd March, 1946, and 28th March, 1946, were invalid and not binding on the plaintiff. Therefore, any action taken by the defendants pursuant to those resolutions may *prima facie* be regarded as ineffective.

On that view of the case, this appeal must be allowed and the decree passed by Bishan Narain, J., must be restored with costs in this Court and before the Division Bench.

P.R.N.

*Appeal allowed. Decree of Single
Judge in Second Appeal restored.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, A. K. SARKAR, M. HIDAYATULLAH AND N. RAJAGOPALA AYYANGAR, JJ.

Naunihal Kishan and others

. . Appellant*

v.

R. S. Ch. Partab Singh and another

. . Respondents.

Displaced Persons (Debts Adjustment) Act (LXX of 1951), sections 2 (6), 5 and 16 (4)—Applicability—Purchaser of equity of redemption in respect of usufructuary mortgage—If debtor entitled to benefits of the Act.

Every usufructuary mortgage, whatever its nature, is within the definition of "debt" under the Displaced Persons (Debts Adjustment) Act, 1951 for the purpose of scaling down under section 16 and it is wholly immaterial whether or not the creditor is entitled to proceed personally against the debtor and recover the amount of the mortgage. The Act has not left the meaning of the expression "debt" where such debt is secured by a mortgage including an usufructuary mortgage, in any manner of doubt, but on the other hand by making specific provision therefor, has put beyond the pale of argument that these are "debts" which could be scaled down under it.

The debtor himself having made the application under section 5 there was no need for any application by the creditor.

The amount due on or secured by a mortgage is a "debt" within the meaning of section 5 to settle which an application could be filed and the debt being a secured debt answering to the description contained in the main part of section 16 (4), the applicants were entitled to have an adjustment in terms of that specified in the Proviso to that section. On the plain terms of sections 5 and 16 the debtors have *locus standi* to file the application.

When the provision in Proviso to section 16 (1) spoke of "value" it must have had in contemplation the value as determined by the procedure for fixing the same under the relevant rules for the computation of equivalents of property of displaced persons left behind in Pakistan and the allotment of evacuee property to them in India. It cannot be urged that it means the market value.

Appeal by Special Leave from the Judgment and Order dated 6th March, 1958, of the Punjab High Court in Letters Patent Appeal No. 6 of 1958.

K. L. Gosain, Senior Advocate, (C. L. Sareen and R. L. Kohli, Advocates, with him), for Appellants.

Roop Chand and Naunit Lal, Advocates, for Respondent No. 1.

Naunit Lal, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—The facts necessary to appreciate the points involved in this appeal by Special Leave against the Judgment of the High Court of Punjab are briefly these. By a registered deed of mortgage dated March 6, 1933, Sham Singh who is respondent No. 2 before us effected an usufructuary mortgage of land measuring 7530 Kanals and 19 Marlas situate in village Mohanpur in the District of Multan (now in Pakistan) to the father of appellants 1 to 3 and to Topan Das—the father of the 4th appellant. The sum secured by the mortgage was Rs. 30,000. The stipulation in the mortgage was that the income derived from the properties transferred to the possession of the mortgagees was to be treated as interest on Rs. 10,000 out of the principal sum and that the balance of Rs. 20,000 was to carry a sum of Rs. 1,650 per annum as interest. The deed further fixed a term of 10 years beyond which the mortgagee could sue for the recovery of the mortgage-money. Subsequent to the deed of mortgage, about 4 years thereafter, the mortgagor—Sham Singh sold a major portion of the mortgaged property consisting of about 6,568 Kanals of land to Guranditta Ram and others. Out of the consideration for this sale a sum of Rs. 26,500 was left with the transferee the same being directed to be paid in discharge of the mortgage. The sale

to Guranditta Ram was subject to a pre-emption claim and the pre-emptor exercised his rights to obtain that relief. Narain Singh—father of Partab Singh, the 1st respondent—was the pre-emptor and in a suit filed by him he obtained on February 16, 1940 a decree for sale in his favour by virtue of his right of pre-emption and in pursuance of this decree he obtained symbolical possession of the land, the mortgagees still continuing to retain the actual possession of the land. The sum of Rs. 26,500 retained with the vendee under the sale by Sham Singh was not paid over to the mortgagee and thus the entire amount of the mortgage-money remained outstanding.

While things were in this state, the country was partitioned in 1947 and both the mortgagor as well as the mortgagees moved into India and they were "displaced persons". The owners of the property, viz., the original mortgagor—respondent No. 2 Sham Singh and the pre-emptor-vendee were, as displaced persons, allotted agricultural land in India on the basis of their original holdings in Pakistan in pursuance of the relevant rules under the Displaced Persons (Compensation and Rehabilitation) Rules. The appellants as the mortgagees entitled to possession of the lands were, in June-July 1950, under these Rules put in possession of the properties allotted to both Sham Singh—the original mortgagor—as well as of Partap Singh—the legal representative of the deceased pre-emptor (Respondent No. 1). The total extent of land of which the respondent had been put in possession was 51 standard acres and 9 units of land made up of 37·4 standard acres as being the property belonging to the pre-emptor-vendee (respondent No. 1) and 14·5 standard acres by virtue of the property allottable to Sham Singh—the original mortgagor (respondent No. 2).

The Union Legislature enacted in November, 1951, the Displaced Persons (Debts Adjustment) Act, 1951 (LXX of 1951) which we shall hereafter refer to as the Act being an Act to make provisions for the adjustment and settlement of debts due by displaced persons. Section 5 of the Act enabled an application to be made by a "displaced debtor" for the adjustment of his debts to a Tribunal—which was defined as meaning "a civil Court having authority to exercise jurisdiction under the Act" for the adjustment of the debts due by the applicant. Section 16 made provision for the manner in which debts secured on immovable property due by displaced debtors were to be reduced, settled and adjusted. Sham Singh as well as Partab Singh made separate applications under section 5 of the Act seeking to obtain the benefit of the settlement and adjustment provision contained in its section 16. The two applications were, in view of their having reference to the same mortgage debt, consolidated and were heard together by the Senior Sub-Judge, Karnal who was the relevant Tribunal under the Act. Several objections were raised by the mortgagee-appellants to these applications but they were overruled and the mortgage debt was scaled down under section 16 and other relevant statutory provisions which were applicable in the manner we shall detail later. An appeal was preferred from this decision to the High Court of Punjab but the same was dismissed by the learned Single Judge. A further appeal under the Letters Patent to a Bench of the High Court was dismissed *in limine* and a certificate of fitness being refused, the appellants applied to this Court for Special Leave and this being granted, the appeal is now before us.

Before we set out the grounds which have been urged before us in support of the appeal it is perhaps convenient that we extract the material portions of some of the provisions of the Act on whose construction the appeal turns. The Act, as we stated, earlier, was enacted *inter alia*, for making provision for adjustment and settlement of debts due by displaced persons. A "displaced debtor" is defined as a displaced person from whom a debt is due or is being claimed: section 2 (9). We might add that it is common ground that both the appellant and the respondents are "displaced persons" as defined in the Act. The word 'debt' used in section 2 (9) is defined in section 2 (6) thus :—

"2. (6). 'debt' means any pecuniary liability, whether payable presently or in future; or under a decree or order of civil of revenue Court or otherwise, or whether ascertained or to be ascertained"

Section 5 is the first of the sections in Chapter II which is headed 'Debt Adjustment Proceedings'. It reads:

"5. (1) At any time within one year after the date on which this Act comes into force in any local area, a displaced debtor may make an application for the adjustment of his debts to the Tribunal within the local limits of whose jurisdiction he actually and voluntarily resides, or carries on business or personally works for gain.
....."

Sub-sections (2) and (3) of this section specify what the application under sub-section (1) should contain but these need not detain us. The next section which is relevant, having regard to the points raised before us, is section 16 which reads:

"16(1) Where a debt incurred by a displaced person is secured by a mortgage, charge or lien on the immovable property belonging to him in West Pakistan, the Tribunal may, for the purpose of any proceeding under this Act, require the creditor to elect to retain the security or to be treated as an unsecured creditor.

(2) If the creditor elects to retain the security, he may apply to the Tribunal, having jurisdiction in this behalf as provided in section 10, for a declaration of the amount due under his debt.

(3) Where in any case, the creditor elects to retain his security, if the displaced debtor receives any compensation in respect of any such property as is referred to in sub-section (1), the creditor shall be entitled—

(a) where the compensation is paid in cash, to a first charge thereon:

Provided that the amount of the debt in respect of which he shall be entitled to the first charge shall be that amount as bears to the total debt the same proportion as the compensation paid in respect of the property bears to the value of the verified claim in respect thereof and to that extent the debt shall be deemed to have been reduced:

(b) where the compensation is by way of exchange of property, to a first charge on the property situate in India so received by way of exchange:

Provided that the amount of the debt in respect of which he shall be entitled to the first charge shall be that amount as bears to the total debt the same proportion as the value of the property received by way of exchange bears to the value of the verified claim in respect hereof and to that extent the debt shall be deemed to have been reduced.

(4) Notwithstanding anything contained in this section, where a debt is secured by a mortgage of agricultural lands belonging to a displaced person in West Pakistan and the mortgage was with possession, the mortgagee shall, if he has been allotted lands in India in lieu of the lands of which he was in possession in West Pakistan, be entitled to continue in possession of the lands so allotted until the debt is satisfied from the usufruct of the lands or is redeemed by the debtor:

Provided that in either case the amount of the debt shall be only that amount as bears to the total debt the same proportion as the value of the lands allotted to the creditor in India bears to the value of the lands left behind by him in West Pakistan and to that extent the debt shall be deemed to have been reduced.

(5) Where a creditor elects to be treated as an unsecured creditor, in relation to the debt, the provisions of this Act shall apply accordingly."

Section 29 (1) enacts:

"29. (1) On and from the 15th day of August, 1947, no interest shall accrue or be deemed to have accrued in respect of any debt owed by a displaced person, and no Tribunal shall allow any future interest in respect of any decree or order passed by it:

Provided that—

(a) where the debt is secured by the pledge of shares, stocks, Government securities or securities of a local authority, the Tribunal shall allow for the period commencing from the 15th day of August, 1947, and ending with the date of commencement of this Act, interest to the creditor at the rate mutually agreed or at a rate at which any dividend or interest has been paid or is payable in respect thereof, whichever is less;

(b) in any other case the Tribunal may, if it thinks it just and proper to do so after taking into account the paying capacity of the debtor as defined in section 32, allow, for the period mentioned in clause (a), interest at a rate not exceeding four per cent, per annum simple."

We shall now proceed to detail the points that were urged before us by learned Counsel for the appellant: (1) The first contention raised before us was that Partab Singh—the representative of the purchaser of the equity of redemption—was not a “debtor” within section 2 (6), because there was no contractual relationship between him and the displaced creditor *i.e.* the appellants. The argument was broadly on these lines: Section 2 (6) of the Act defined the word ‘debt’ and the expression ‘debt’ is employed in section 2 (9) as also in section 5 (1) under which the application giving rise to the appeal was filed. The essence of that definition is that it involves a pecuniary liability on the part of the ‘debtor’ enforceable by a creditor. Thus it was urged that a mortgagor under a purely usufructuary mortgage where there was no personal covenant to repay the loan, could not be said to be a debtor and the amount secured under such a mortgage could not therefore be a “debt” within the definition. The position of a purchaser of the equity of redemption *vis-a-vis* the mortgagee was, learned Counsel urged, similar. He further urged that the fact in the case of a purchaser of the equity of redemption, even if the mortgagee could bring a suit for the recovery of the mortgage-money and in enforcement of that liability the mortgaged property could be sold was not sufficient to make him a debtor as according to him the absence of a personal liability to discharge the obligation out of his other property not under mortgage was the essence of a debtor and creditor relationship under the definition. In support of this submission learned Counsel referred us to two decisions one of the Lahore High Court in *Lachhman Singh v. Natha Singh and others*¹ and the other of the Bombay High Court in *Manubhai Mahijibhai Patel and others v. Trikamlal Laxmidas and others*². *Lachhman Singh v. Natha Singh and others*¹ turned on the meaning of the expression ‘debt’ in the Punjab Relief of Indebtedness Act (VII of 1934) and it was held that the amount secured by a pure usufructuary mortgage which neither stipulated for the personal liability of the obligor to pay, nor conferred on the obligee the right to recover the amount by the coercive machinery of law, could not be called a ‘debt’ in that the essence of the concept of ‘debt’ consisted in the personal liability of the obligor which the obligee was entitled to enforce by action. This decision, even apart from the terms of section 16 of the Act which in terms includes an usufructuary mortgage in the category of “a debt” for the purposes of the Act, affords little assistance to the appellant before us, because the mortgage of 1933 in favour of the appellant contains a covenant on the part of the mortgagor to repay the debt after 10 years and in consequence the mortgagee was entitled to file a suit for the recovery of his debt and realise it from the sale of the mortgaged property and also obtain a personal decree under Order 34, rule 6 against the mortgagor—Sham Singh—though he might not be entitled to a personal decree against the purchaser of the equity of redemption. The other decision of the Bombay High Court dealt with the construction of the Bombay Agricultural Debtors’ Relief Act and the Head-note specifies the point decided as being that in the absence of an agreement making a mortgagor personally liable to the mortgagee, a purchaser of the equity of redemption was not entitled to apply under section 4 of that Act for the adjustment of the mortgage debt, inasmuch as such a mortgage debt was not “his debt” within the meaning of section 4. This extract sufficiently shows that the decision turned wholly upon the definitions contained in the enactment before the Court and could not be called in aid as laying down any general propositions of universal application. On the other hand, there is a decision of the High Court of the Punjab in *Lahori Lal and others v. Kasturi Lal and others*³ in which the Bench held that a debt as defined in section 2 (6) of the Act now under consideration was not limited to personal liabilities only.

We consider that the Act has not left the meaning of the expression “debt” where such debt is secured by a mortgage including an usufructuary

1. I. L. R. (1941) Lah 71.
2. I. L. R. (1938) Bom. 1429.
3. 58 P. L. R. 331.

mortgage, in any manner of doubt, but on the other hand by making specific provision therefor, has put beyond the pale of argument that these are "debts" which could be scaled down under it. We have already extracted section 16 of the Act which contains the provision for adjustment of debts where these are secured by mortgage on immovable property. As the property which is the security for the mortgagee is situate in West Pakistan sub-section (1) applies which affords the creditor an option either to retain the security or to be treated as an unsecured creditor. It is common ground that the appellant desired to retain the security. Sub-section (2) therefore comes into play and enables the creditor to move the Tribunal for a declaration regarding the amount due to him in respect of that mortgage. In the present case the debtor himself having made the application under section 5, there was no need for any application by the creditor. The reliefs which a creditor might obtain in case of his election to retain the security are set out in sub-sections (3) and (4), the former being applicable to simple mortgages and the latter where the mortgage is usufructuary *i. e.*, with possession. Sub-section (4) which is relevant to the mortgage debt involved in this appeal runs :

"(4), Notwithstanding anything contained in this section, where a debt is secured by mortgage of agricultural lands belonging to a displaced person in West Pakistan and the mortgage was with possession, the mortgagee shall, if he has been allotted lands in India in lieu of the lands of which he was in possession in West Pakistan, be entitled to continue in possession of the lands so allotted until the debt is satisfied from the usufruct of the lands or is redeemed by the debtor :—

Provided that in either case the amount of the debt shall be only that amount as bears to the total debt the same proportion as the value of the lands allotted to the creditor in India bears to the value of the lands left behind by him in West Pakistan and to that extent the debt shall be deemed to have been reduced".

It was not disputed that the debt due to the appellant was secured by a mortgage of agricultural lands and that those lands belonged to a displaced person from West Pakistan. It was also common ground that the mortgage in favour of the appellant was with possession. It ought to be mentioned that it was by virtue of provisions on the lines of the opening words of sub-section (4) contained in the rules and executive orders which were in force in 1950, that the appellant was put in possession of the 37. 4 and 14. 5 standard acres belonging respectively to Partab Singh and Sham Singh. It is therefore very difficult to appreciate the argument urged on behalf of the appellant that the provisions of sub-section (4) of section 16 are not attracted to the present case. In the first place the words "and the mortgage is with possession" are perfectly general and therefore apt and comprehensive enough to include not merely usufructuary mortgages in which there is a personal covenant on the part of the mortgagor to repay the debt, but also what are usually termed "pure" usufructuary mortgages containing no such personal covenant. There is therefore no scope for the argument based on the analogy of other enactments in which the word 'debt' has been construed as indicating the necessity for a personal liability or an obligation to repay on the part of the debtor. Having regard to the terms of section 16 (4) the security being by way of usufructuary mortgage and the right of a debtor to redeem are sufficient to enable the beneficial provisions of the section being attracted. It is only necessary to add that what might have been apparent from what we have said earlier, *viz.*, (1) that the point based upon the definition of a 'debt' in section 2 (6) is wholly inapplicable to the case of Sham Singh since the mortgage itself contained a personal covenant and (2) that even in regard to Partab Singh, the other applicant, the contention has a very limited application since having regard to the personal covenant the mortgagee had a right to sue for the enforcement of his mortgage and recover the money from the sale of the mortgaged property. So that apart even from the terms of section 16 (4) the liability under the mortgage in favour of the appellant would squarely fall within the definition in section 2 (6). The matter is, however, put beyond the range of controversy by the specific provision in regard to all

usufructuary mortgages by section 16 (4) of the Act. In this connection we might refer to the decision of this Court in *Rajkumari Kaushalya Devi v. Bawa Pritma Singh and another* where it was ruled that a mortgage-debt was within the definition of the word 'debt' in section 2 (6) of the Act. No doubt, that case was not concerned with the distinction between cases where the creditor has a right to proceed personally against the debtor and cases where he has not, as in the case of a pure usufructuary mortgage, but the decision is useful as indicating that the expression 'pecuniary liability' in section 2 (6) has to be understood not in isolation but with reference to other provisions of the Act and particularly section 16. We are therefore clearly of the opinion that every usufructuary mortgage, whatever its nature, is within the definition of 'debt' under the Act for the purpose of scaling down under section 16 and that it is wholly immaterial whether or not the creditor is entitled to proceed personally against the debtor and recover the amount of the mortgage.

(2) The next contention urged by the learned Counsel has less substance than the one we have just disposed of. It was said that the liability under a mortgage debt could be scaled down and adjusted under the Act only in a suit for redemption filed by the creditor and that it was incompetent for a debtor to invoke the jurisdiction of the Tribunal to effect the scaling down and adjustment by an application under section 5. We do not consider that this argument merits serious consideration. Section 5 (1) of the Act which we have extracted enables a "debtor" to make an application to the Tribunal for the adjustment of his debts. In view of what we have stated earlier the amount due on or secured by the mortgage is a "debt" within the meaning of section 5 to settle which an application could be filed and the debt being a secured debt answering to the description contained in the main part of section 16 (4), the applicants were entitled to have an adjustment in terms of that specified in the Proviso to that section. Though this point about the *locus standi* of the respondent-debtors to file the application has been persisted in by the appellants at every stage of these proceedings, we consider that there is no merit in it and it has to be rejected on the plain terms of section 5 read with section 16.

(3) The third and last objection urged by the learned Counsel turns on the language of the Proviso to section 16 (4) which we shall extract once again :

"Provided that in either case the amount of the debt shall be only that amount as bears to the total debt the same proportion as the value of the lands allotted to the creditor in India bears to the value of the lands left behind him in the West Pakistan and to that extent the debt shall be deemed to have been reduced."

Learned Counsel pointed out that the scaling down effected in the present case was on the following basis. The total mortgage-debt under the mortgage deed was computed at Rs. 51,700 calculating interest as permitted by the relevant statutory provisions and taking into accounts section 29 which we have already extracted. The correctness of this figure was not disputed. The quarrel of learned Counsel was in regard to what follows and that is stated in the order of the Tribunal which has been confirmed by the appellate Court in these terms :

"The total mortgaged land now belonging to the petitioner (Pertap Singh) and respondent No. 5 (Sham Singh) has been assessed as equivalent to 359 standard acres 14½ units (329 standard acres 13½ units of the petitioner plus 22 standard acres 6½ units of the respondent No. 5), and in lieu thereof the mortgagors have been given in all 51 standard acres 9 units (37. 4. to the petitioners and 14.5 to the respondent No. 5). As provided under section 16 (4) of the Act the amount of the debt payable to respondents 1 to 4 has been reduced in the same proportion in which the land has been allotted to the mortgagors. For the land belonging to them the mortgage debt amounting to Rs. 51,700/- when reduced to this proportion comes approximately to Rs. 7,420/-

It is this reduction that learned Counsel complains as not justified by the Proviso. The argument is that under the Proviso to section 16 (4) the reduction of the debt has to bear the same proportion as "the value of the lands" allotted

to the creditor in India bears to "the value of the lands" left by him in Pakistan. "Value", learned Counsel says, means market value. It is urged that value of neither of the lands was computed on that basis but that the Tribunal took into account merely the proportion between the two extents or areas *i. e.*, the standard acres left in Pakistan compared to the standard acres allotted in India in lieu thereof. This contention that the procedure adopted does not accord with the requirements of the Proviso has been rejected by all the Courts and, in our opinion, correctly. The fallacy in the argument of learned Counsel consists in ignoring the fact that in computing the standard acres left by a displaced person in Pakistan the rehabilitation authorities are, under the relevant Rules and instructions, directed to take into account the income yield of the two sets of lands and thus the "value" of the land left behind is reflected in ascertaining the "standard acres". Thus though market value in the sense of what a willing purchaser would pay for the land left behind was not ascertained—it was obviously not practicable to ascertain it—the Rules etc. made sufficient provision for such a valuation to be reflected in the computation of the area to be allotted instead. The nature of the land left behind—whether it was canal-irrigated, well-irrigated, or dry or merely rain-fed—was taken into account and numerical factors were prescribed based on these criteria for ascertaining the equivalent of those lands in India. It was after such a computation was made that the 7531 Kanals and odd of land which belonged to the respondents was equated to 359 and odd standard acres. If therefore 359 standard acres were the equivalent in value of the land left behind, regard being had to the circumstances we have indicated, there cannot be any complaint that there has been a departure from the method of adjustment specified in the Proviso to section 16 (4) when the debt as ascertained and computed in accordance with section 29 of the Act and other relevant statutory provisions was scaled down under section 16 (4) by multiplying it by $51/359$, or $1/7$ th. We are further of the opinion that when the provision in Proviso to section 16 (1) spoke of "value" it must have had in contemplation the value as determined by the procedure for fixing the same under the relevant Rules for the computation of equivalents of property of displaced persons left behind in Pakistan and the allotment of evacuee property to them in India. There is no substance, therefore, in this point either. These were the only points urged before us. The appeal fails and is dismissed with costs.

K. S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :-B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Akadasi Padhan

*. . . Petitioner**

v.

The State of Orissa and others

. . . Respondents

Orissa Kendu Leaves (Control of Trade) Act, (XXVIII of 1961), sections 3 to 6, 8 and 9—Validity of—Constitution of India (1950), (Article 19 (6)—Constitution (First Amendment) Act, 1951—Scope and effect.

The theory underlying the First Amendment of the Constitution of India (1950) in so far as it relates to the concept of State monopoly does not appear to be based on the pragmatic approach but on the doctrinaire approach which Socialism accepts.

The effect of the amendment made in Article 19 (6) of the Constitution of India (1950) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19 (6) and would inevitably have to satisfy the test of the first part of Article 19 (6). In dealing with the attack against the validity of a law creating State monopoly on the

ground' that its provisions impinge upon the other fundamental rights guaranteed by Article 19 (1), it would be necessary to decide what is the purpose of the Act and its direct effect. If the direct effect of the Act is to impinge upon any other right guaranteed by Article 19 (1) its validity will have to be tested in the light of the corresponding clauses in Article 19; if the effect on the said right is indirect or remote then its validity cannot be successfully challenged.

Sections 3, 4, 5, 6, 8 and 9 of the impugned Act are not open to challenge. The requirements of Article 19 (6) (ii) would be satisfied if the working of the monopoly is left either to the State or to the officers of the State appointed in that behalf or to the department of the State or to persons appointed as agents to carry on the work of the monopoly strictly on behalf of the State. In the instant case the agency agreement is invalid in as much as it is wholly inconsistent with the requirements of section (3) (1) (c).

Petition under Article 32 of the Constitution of India for the enforcement of fundamental rights.

G. S. Pathak, Senior Advocate, (C. P. Lal, Advocate, with him), for Petitioner.

M. C. Setalvad, Attorney-General for India, Dinabandhu Sahu, Advocate-General, for the State of Orissa and C. B. Agarwala, Senior Advocate, (R. H. Dhebar and R. N. Sachthey, Advocates, with them), for Respondent No. 1.

The Judgment of the Court was delivered by

Gajendragadkar, J.—In challenging the validity of the Orissa Kendu Leaves (Control of Trade) Act 1961 (XXVIII 1961) (hereinafter called the Acticle), this petition under Article 32 of the Constitution raises an important question about the scope and effect of the provisions of Article 19 (6). The petitioner Akadasi Padhan owns about 130 acres of land in village Bettagada, Sub-division Rairakhol in the District of Sambalpur, and in about 80 acres of the said land he grows Kendu leaves. Kendu leaves are used in the manufacture of bidis; and so, prior to 1961, the petitioner used to carry on extensive trade in the sale of Kendu leaves by transporting them to various places in and outside the District of Sambalpur. But since the Act was passed in 1961 and it came into force on January 3, 1962, the State has acquired a monopoly in the trade of Kendu leaves, and that has put severe restrictions on the fundamental rights of the petitioner under Articles (19) (1) (f) and (g). That, in substance, is the basis of the present petition.

The petition alleges that, in substance, the Act creates a monopoly in favour of certain individuals described as Agents by the relevant provisions of the Act, and in that sense, it is a colourable piece of legislation. Under the relevant provisions of the Act, three notifications have been issued, and the validity of these notifications is also challenged by the petition. The first notification published on January 8, 1962 under section 5 of the Act, gives a schedule of the Districts; the number of units in which the Districts are divided and the local areas covered by the said units. The District of Sambalpur in which the petitioner resides has been divided into five units and the petitioner's lands fall under units 2 and 5. On January 10, 1962, applications were called from persons who desired to be appointed as Agents of the Government of Orissa for purchase of and trade in Kendu leaves, and the notification by which these applications were called for made it clear that the Government reserved to itself the right to reject any or all applications in respect of any unit without assigning any reason whatsoever. Then followed the notification of January 25, 1962, which prescribed the price for the Kendu leaves at 50 leaves per naya Paisa. This notification stated that the said price had been fixed by the State Government in consultation with the Advisory Committee appointed under section 4 of the Act. The last notification to which reference must be made is the notification which was issued on March 10, 1962, making certain corrections in the units of the local areas notified by the notification of January 8, 1962. The validity of these notifications is challenged by the petitioner on the ground that the relevant provisions under which the said notifications are issued are invalid, and also on the general ground that the Act in its entirety is *ultra vires*.

The petition has averred that sections 3, 5, 6 and 16 of the Act are invalid because they contravene Article 14, but this part of the case has not been argued before us. The main attack has been directed generally against the validity of the whole Act and sections 3 and 4 in particular on the ground that they violate Article 19 (1) (f) and (g). The relief claimed by the petitioner is that this Court may declare that the whole Act is *ultra vires* and restrain respondent No. 1, the State of Orissa, from giving effect either to the provisions of the impugned notifications or to the provisions of the impugned Act.

The challenge made by the petitioner to the validity of the Act and the relevant notifications is met by respondent No. 1 mainly on the ground that the Orissa Legislature was competent to pass the Act and that its provisions do not contravene Article 19 (1) (f) or (g). It is urged that under Article 19 (6), the State Legislature is empowered to create a State monopoly in any trade or business and a monopoly thus created cannot be successfully challenged either under Article 19 (1) (f) or under Article 19 (1) (g). In support of its case that the prices fixed under the Act and the scheme of enforcing the State monopoly adopted by the Act are reasonable, respondent No. 1 has referred to the previous legislative history in respect of Kendu leaves, and has pointed out that the Act was passed in pursuance of the recommendations made by a Taxation Enquiry Committee appointed by the State Government in 1959. Besides, it has emphasised that 75% of the Kendu leaves produced in the State of Orissa grow in Government lands, and the monopoly created by the Act affects only 25% of the total produce of Kendu leaves in the State. The affidavit filed by respondent No. 1 also shows that the price fixed in consultation with the Advisory Committee is fair and reasonable and would leave a fair margin of profit to the grower of Kendu leaves. It is on these rival contentions that the validity of the Act as well as the notifications has to be considered in the present petition.

Before referring to the relevant provisions of the Act, it would be relevant to refer to the legislative background in respect of Kendu leaves. In 1949, the Government of Orissa had passed an Order in exercise of its powers conferred on it by sub-section (1) of section 3 of the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1947. This Order was called the Orissa Kendu Leaves (Control and Distribution) Order, 1949. The broad scheme of this Order was that the area in the State was divided into units, and licences were issued to persons who were entitled to trade in Kendu leaves. The District Magistrate fixed the minimum rate from time to time and the Order provided that the licensees were bound to purchase Kendu leaves from the pluckers or owners of private trees and forests at rates not below the minimum prescribed. In other words, the trade of Kendu leaves was entrusted to the licensees who were under an obligation to purchase Kendu leaves offered to them at prices not below the minimum prescribed by the Order.

This Order was followed by the Orissa Kendu Leaves Control Order, 1960, passed under the same provision of the Orissa Act of 1947. The licensees were continued under this Order, but some other provisions were made, such as the appointment of a Committee for each District to fix the minimum price. In other words, the licensing system continued even under this latter Order.

It appears that when there was a change in the Government of Orissa, the monopoly created in favour of the licensees was changed over to controlled competition, and when the Congress Government came back to power, it was faced with the problem that the controlled competition introduced by its predecessor had led to a loss in Government revenue. That is why, in pursuance of the recommendations made by the Taxation Enquiry Committee, the present Act has been passed with the object of

creating a State monopoly in the trade of Kendu leaves. It would thus be seen that though the Act creates a State monopoly in the trade of Kendu leaves, a kind of monopoly in favour of the licensees had been in operation in the State since 1949, except for a short period when the experiment of controlled competition was tried by the Coalition Government which was then in power.

Let us now examine the broad features of the Act. The Act consists of 20 sections, and as its Preamble indicates, it was passed because the Legislature thought that it was expedient to provide for regulation of trade in Kendu leaves by creation of State monopoly in such trade. Section 2 of the Act defines "agent" as meaning an agent appointed under section 8, and "unit" as a unit constituted under section 5: "grower of Kendu leaves" means any person who owns lands on which Kendu plants grow or who is in possession of such lands under a lease or otherwise; and "permit" means a permit issued under section 3. Section 3 (1) provides that no person other than (a) the Government; (b) an officer of Government authorised in that behalf; or (c) an agent in respect of the unit in which the leaves have grown; shall purchase or transport Kendu leaves. It is thus clear that by imposing restrictions on the purchase or transport of Kendu leaves section 3 has created a monopoly. There are two *Explanations* to section 3 (1) and two sub-sections to the said section, but it is unnecessary to refer to them. Section 4 deals with the fixation of sale price. Section 4 (1) lays down that the price at which Kendu leaves shall be purchased shall be fixed by the State Government after consultation with the Advisory Committee constituted under section 4 (2). After the price is thus fixed, it has to be published in the Gazette in the manner prescribed not later than January 31, and after it is published, the price would prevail for the whole of the year and shall not be altered during that period. The Proviso to section 4 (1) permits different prices to be fixed for different units, having regard to the five factors specified in clauses (a) to (e). Clause (a) has reference to the prices fixed under any law during the preceding three years in respect of the area in question; clause (b) refers to the quality of the leaves grown in the unit; clause (c) to the transport facilities available in the unit; clause (d) to the cost of transport; and clause (e) to the general level of wages for unskilled labour prevalent in the unit. Section 4 (2) provides that the Advisory Committee to be constituted by the Government shall consist of not less than six members as will be notified from time to time; and the Proviso to it lays down that not more than one-third of such members shall be from amongst persons who are growers of Kendu leaves. Under sub-section (3), it is provided that it shall be the duty of the Committee to advise Government on such matters as may be referred to it by Government; and sub-section (4) prescribes that the business of the Committee shall be conducted in such manner and the members shall be entitled to such allowances, if any, as may be prescribed. Section 5 allows the constitution of units, and section 6 provides for the opening of depots, publication of price list and the hours of business etc. Section 7 (1) imposes an obligation on the Government and the authorised officer or agent to purchase Kendu leaves offered at the price fixed under section 4 in the manner specified by it; under the Proviso, option is left to the Government or any Officer or agent not to purchase any leaves which in their opinion are not fit for the purpose of manufacture of bidis. Section 7 (2) provides for a remedy to a person aggrieved by the refusal of the Government to purchase the Kendu leaves. Section 7 (3) deals with cases where leaves offered are suspected to be leaves from the Government forests and it lays down the manner in which such a case should be dealt with. Section 8 deals with the appointment of agents in respect of different units and it allows one person to be appointed for more than one unit. Under section 9, every grower of Kendu leaves has to get himself registered in the prescribed manner if the quantity of leaves grown by him during the year is likely to exceed ten standard maunds. Section 10 authorises the Government or its officer or agent to sell or otherwise dispose of Kendu leaves purchased by them. Section 11 provides

for the application of net profits which the State Government may make as a result of the operation of this Act; this profit has to be divided between the different Samitis and Gram Panchayats as prescribed by the said section. Section 12 deals with delegation of powers; section 13 confers power of entry, search and seizure; section 14 deals with penalty; section 15 deals with offences and section 16 makes the offences cognizable; section 17 makes savings in respect of acts done in good faith; by section 18, Government is given power to make Rules; by section 19, the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1955 is repealed in so far as it relates to Kendu leaves; and section 20 gives the power to the State Government to remove doubts and difficulties. These are the broad features of the Act.

The first contention which has been raised by Mr. Pathak on behalf of the petitioner is that the creation of State monopoly in respect of the trade of purchase of Kendu leaves contravenes the petitioner's fundamental rights under Article 19 (1) (f) and (g). There has been some controversy before us as to whether the petitioner can claim any fundamental right under Article 19 (1) (g). The learned Attorney-General contended that the petitioner is merely a grower of Kendu leaves and as such, though he may be entitled to say that the restrictions imposed by the Act affect his right to dispose of his property under Article 19 (1) (f), he cannot claim to be a person whose occupation, trade or business has been affected. For the purpose of the present petition, we have, however, decided to proceed on the basis that the petitioner is entitled to challenge the validity of the Act both under Article 19 (1) (f) and Article 19 (1) (g); and that makes it necessary to examine the argument raised by Mr. Pathak that the creation of the State monopoly contravenes Article 19 (1) (g).

Mr. Pathak suggests that the effect of the amendment made by the Constitution (First Amendment) Act, 1951 in Article 19 (6) is not to exempt the law passed for creating a State monopoly from the application of the rule prescribed by the first part of Article 19 (6). In other words, he suggests that the effect of the amendment is merely to enable the State Legislature to pass a law creating a State monopoly, but that does not mean that the said law will still not have to be justified on the ground that the restrictions imposed by it are reasonable and are in the interests of the general public. On the other hand, the learned Attorney-General contends that the object of the amendment was to put the monopoly laws beyond the pale of challenge under Article 19 (1) (f) and (g). It would thus be noticed that the two rival contentions take two extreme positions. The petitioner's argument is that the monopoly law has to be tested in the light of Article 19 (6); if the test is satisfied then the contravention of Article 19 (1) (g) will not invalidate the law. On the other hand, the State contends that the monopoly law must be deemed to be valid in all its aspects because that was the very purpose of making the amendment in Article 19 (6).

Before proceeding to examine the merits of these contentions, it is relevant to recall the genesis of the amendment introduced by the Constitution (First Amendment) Act, 1951. Soon after the Constitution came into force, the impact of socio-economic legislation, passed by the Legislatures in the country in pursuance of their welfare policies, on the fundamental rights of the citizens in respect of property came to be examined by Courts, and the Articles on which the citizens relied were 19 (1) (f) and (g) and 31 respectively. In regard to State monopolies, there never was any doubt that as a result of Entry 21 in List III both the State and the Union Legislatures were competent to pass laws in regard to commercial and industrial monopolies, combines and trusts, so that the legislative competence of the Legislatures to create monopolies by legislation could not be questioned. But the validity of such legislation came to be challenged on the ground that it contravened the citizens' rights under Article 19 (1) (g). As a typical case on the point, we may refer to the decision of the Allahabad

High Court in *Moti Lal and others v. The Government of the State of Uttar Pradesh and others*¹. The result of this decision was that a monopoly of transport sought to be created by the U.P. Government in favour of the State-operated Bus Service, known as the Government Roadways, was struck down as unconstitutional, because it was held that such a monopoly totally deprived the citizens of their rights under Article 19 (1) (g). As a result of this decision it was realised by the Legislature that the legislative competence to create monopolies would not necessarily make monopoly law valid if they contravened Article 19 (1). That is why Article 19 (6) came to be amended. Incidentally, it may be of interest to note that about the same time, the impact of legislative enactments in regard to acquisition of property on the citizens fundamental rights to property under Article 19 (1) (f) also came for judicial review and the decisions of Courts in respect of the acquisition laws in turn led to the amendment of Article 31 on two occasions; firstly, when the Constitution (First Amendment) Act was passed in 1951 and secondly, when the Constitution (Fourth Amendment) Act was passed in 1955.

Article 19 (6) as amended reads thus :

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes; or prevent the State from making any law imposing; in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,—

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

It would be noticed that the amendment provides, *inter alia*, that nothing contained in Article 19 (1) (g) will prevent the State from making any law relating to the carrying on by the State of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise; and this clearly means that the State may make a law in respect of any trade, business, industry, or service whereby complete monopoly could be created by which citizens are wholly excluded from the trade, business, industry or service in question; or a law may be passed whereby citizens are partially excluded from such trade, business, industry or service; and a law relating to the carrying on of the business either to the complete or partial exclusion of citizens will not be affected because it contravenes Article 19 (1) (g). The question which arises for our decision is : what exactly is the scope and effect of this provision?

In attempting to construe Article 19 (6), it must be borne in mind that a literal construction may not be quite appropriate. The task of construing important constitutional provisions like Article 19 (6) cannot always be accomplished by treating the said problem as a mere exercise in grammar. In interpreting such a provision, it is essential to bear in mind the political or the economic philosophy underlying the provisions in question, and that would necessarily involve the adoption of a liberal and not a literal and mechanical approach to the problem. With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the Socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the Rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by these considerations, and treated it as a matter of principle that all important and

nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output.

The amendment made by the Legislature in Article 19 (6) shows that according to the Legislature, a law relating to the creation of State monopoly should be presumed to be in the interests of the general public. Article 19 (6) (ii) clearly shows that there is no limit placed on the power of the State in respect of the creation of State monopoly. The width of the power conferred on the State can be easily assessed if we look at the words used in the clause which cover trade, business, industry or service. It is true that the State may, according to the exigencies of the case and consistently with the requirements of any trade, business, industry or service, exclude the citizens either wholly or partially. In other words, the theory underlying the amendment in so far as it relates to the concept of State monopoly, does not appear to be based on the pragmatic approach, but on the doctrinaire approach which Socialism accepts. That is why we feel no difficulty in rejecting Mr. Pathak's argument that the creation of a State monopoly must be justified by showing that the restrictions imposed by it are reasonable and are in the interests of the general public. In our opinion, the amendment clearly indicates that State monopoly in respect of any trade or business must be presumed to be reasonable and in the interests of the general public, so far as Article 19 (1) (g) is concerned.

The amendment made in Article 19 (6) shows that it is open to the State to make laws for creating State monopolies, either partial or complete, in respect of any trade, business, industry or service. The State may enter trade as a monopolist either for administrative reasons, or with the object of mitigating the evils flowing from competition, or with a view to regulate prices, or improve the quality of goods, or even for the purpose of making profits in order to enrich the State Exchequer. The Constitution-makers had apparently assumed that the State monopolies or schemes of nationalisation would fall under, and be protected by Article 19 (6) as it originally stood; but when judicial decisions rendered the said assumption invalid, it was thought necessary to clarify the intention of the Constitution by making the amendment. It is because the amendment was thus made for purposes of clarification that it begins with the words "in particular". These words indicate that restrictions imposed on the fundamental rights guaranteed by Article 19 (1) (g) which are reasonable and which are in the interests of the general public, are saved by Article 19 (6) as it originally stood; the subject-matter covered by the said provision being justiciable, and the amendment adds that the State monopolies or nationalisation schemes, which may be introduced by legislation, are an illustration of reasonable restrictions imposed in the interests of the general public and must be treated as such. That is why the question about the validity of the laws covered by the amendment is no longer left to be tried in Courts. This brings out the doctrinaire approach adopted by the amendment in respect of a State monopoly as such.

This conclusion, however, still leaves two somewhat difficult questions to be decided; what does "a law relating to" a monopoly used in the amendment mean? and what is the effect of the amendment on the other provisions of Article 19 (1)? The Attorney-General contends that the effect of the amendment is that whenever any law is passed creating a State monopoly, it will not have to stand the test of reasonableness prescribed by the first part of Article 19 (6) and its reasonableness or validity cannot be examined under any other provision of Article 19 (1). Taking the present Act, he urges that if the State monopoly is protected by the amendment of Article 19 (6), all the relevant provisions made by the Act in giving effect to the said monopoly are also equally protected and the petitioners cannot be heard to challenge their validity on any ground. What

is protected by the amendment must be held to be constitutionally valid without being tested by any other provisions of Article 19 (1). That, in substance, is the position taken by the learned Attorney-General.

In dealing with the question about the precise denotation of the clause "a law relating to", it is necessary to bear in mind that this clause occurs in Article 19 (6) which, in a sense, an exception to the main provision of Article 19 (1) (g). Laws protected by Article 19 (6) are regarded as valid even though they impinge upon the fundamental right guaranteed under Article 19 (1) (g). That is the effect of the scheme contained in Article 19 (1) read with clauses (2) to (6) of the said Article. That being so, it would be unreasonable to place upon the relevant clause an unduly wide and liberal construction. "A law relating to" a State monopoly cannot, in the context, include all the provisions contained in the said law whether they have direct relation with the creation of the monopoly or not. In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19 (6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19 (6). In other words, the effect of the amendment made in Article 19 (6) is to protect the law relating to the creation of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19 (6) and would inevitably have to satisfy the test of the first part of Article 19 (6).

The next question to consider is: what is the effect of the amendment on the other fundamental rights guaranteed by Article 19 (1)? It is likely that a law creating a State monopoly may, in some cases, affect a citizen's rights under Article 19 (1) (f) because such a law may impinge upon the citizen's right to dispose of property. Is the learned Attorney-General right when he contends that laws protected by the latter part of Article 19 (6) cannot be tested in the light of the other fundamental rights guaranteed by Article 19 (1)? The answer to this question would depend upon the nature of the law under scrutiny. There is no doubt that the several rights guaranteed by the 7 sub-clauses of Article 19 (1) are separate and distinct fundamental rights and they can be regulated only if the provision contained in clauses (2) to (6) are respectively satisfied. But in dealing with the question as to the effect of a law which seeks to regulate the fundamental right guaranteed by Article 19 (1) (g) on the citizen's right guaranteed by Article 19 (1) (f), it will be necessary to distinguish between the direct purpose of the Act and its indirect or incidental effect. If the legislation seeks directly to control the citizen's right under Article 19 (1) (g), its validity has to be tested in the light of the provisions contained in Article 19 (6); and if such a legislation, as for instance, a law creating a State monopoly, indirectly or incidentally affects a citizen's right under another clause of Article 19 (1) as for instance, Article 19 (1) (f), that will not introduce any infirmity in the Act itself. As was observed by Kania, C. J., in *A. K. Gopala v. The State of Madras*¹, if there is a legislation directly attempting to control citizen's freedom of speech or expression, or his right to assemble peaceably and without arms, etc., the question whether that legislation is saved by the relevant clause of Article 19 will arise. If, however, the legislation is not directly in respect of any of these subjects, but as a result of the operation of other legislation, for instance for punitive or preventive detention, his right under any of these sub-clauses is abridged, the question of the application of Article 19 does not arise. The true approach is only to consider the directness of the legislation and not what will be the result of the detention otherwise valid, on the mode of the detainee's life.

1. (1950) S.C.J. 174; (1950) 2 M.L.J. 42; (1950) S.C.R. 88 at p. 101.

These observations were subsequently adopted by Patanjali Sastri, J., in *Ram Singh and others v. The State of Delhi and another*¹, who added that in *Gopalan's case* the majority view was that a law which authorises deprivation of personal liberty did not fall within the purview of Article 19 and its validity was not to be judged by the criteria indicated in that Article but depended on its complaints with the requirements of Articles 21 and 22, and since section 3 satisfied those requirements, it was constitutional.

The same view has been accepted by this Court in *Express Newspapers (Private), Ltd. and another v. The Union of India and others*², as well as in *The State of Bombay v. R.M.D Chamarbaugwala*³. Therefore, in dealing with the attack against the validity of a law creating State monopoly on the ground that its provisions impinge upon the other fundamental rights guaranteed by Article 19 (1), it would be necessary to decide what is the purpose of the Act and its direct effect. If the direct effect of the Act is to impinge upon any other right guaranteed by Article 19 (1), its validity will have to be tested in the light of the corresponding clauses in Article 19; if the effect on the said right is indirect or remote, then its validity cannot be successfully challenged.

It will be recalled that clause (6) is co-related to the fundamental right guaranteed under Article 19 (1) (g) as other clauses are co-related to the other fundamental rights guaranteed by Article 19 (1) (a) to (f), and so, the protection afforded by the said clause would be available to the impugned statute only in resisting the contention that it violates the fundamental right guaranteed under Article 19 (1) (g). If the statute, in substance affects any other right not indirectly, but directly, the protection of clause 19 (6) will not avail and it will have to be sustained by reference to the requirements of the corresponding clauses in Article 19. The position, therefore, is that a law creating a State monopoly in the narrow and limited sense to which we have already referred would be valid under the latter part of Article 19 (6), and if it indirectly impinges on any other right, its validity cannot be challenged on that ground. If the said law contains other incidental provisions which are not essential and do not constitute an integral part of the monopoly created by it, the validity of those provisions will have to be tested under the first part of Article 19 (6), and if they directly impinge on any other fundamental right guaranteed by Article 19 (1), the validity of the said clauses will have to be tested by reference to the corresponding clauses of Article 19. It is obvious that if the validity of the said provisions has to be tested under the first part of Article 19 (6) as well as Article 19 (5), the position would be the same because for all practical purposes, the tests prescribed by the said two clauses are the same. In our opinion, this approach introduces a harmony in respect of the several provisions of Article 19 and avoids a conflict between them.

In this connection, it is necessary to add that in a large majority of cases where State monopoly is created by statute, no conflict would really arise, e.g., where under State monopoly, the State purchases raw material in the open market and manufactures finished goods, there would hardly be an occasion for the infringement of the citizen's right under Article 19 (1) (f). Take, for instance, the State monopoly in respect of road transport or air transport; a law relating to such a monopoly would not normally infringe the citizen's fundamental right under Article 19 (1) (f). Similarly, a State monopoly to manufacture steel, armaments, or transport vehicles, or railway engines and coaches, may be provided for by law which would normally not impinge on Article 19 (1) (f). If the law creating such monopolies however, were to make incidental provisions directly impinging on the citizens' rights under Article 19 (1) (f), that would be another matter.

What provisions of the impugned statute are essential for the creation of the monopoly, would always be a question of fact. The essential attributes of the law creat-

1. (1951) S.C.J. 374 : (1951) S.C.R. 451 at p. 456.

2. (1958) S.C.J. 1113 : (1959) S.C.R. 12 at pp. 128-130.

3. (1957) S.C.J. 607: (1957) 2 M.L.J. (S.C.) 87: (1957) 2 A.W.R. (S.C.) 87 : (1957) M.L.J. (Cri.) 558: (1957) S.C.R. 874 at p. 927.

ing a monopoly will vary with the nature of the trade or business in which the monopoly is created ; they will depend upon the nature of the commodity, the nature of commerce in which it is involved and several other circumstances. In the present case, the State monopoly has been created in respect of Kendu leaves, and the main point of dispute between the parties is about the fixation of purchase price which has been provided for by section 4. Mr. Pathak contends that the fixation of purchase price is not essential for the creation of monopoly, whereas the learned Attorney-General argues that monopoly could not have functioned without the fixation of such price. We are not prepared to accept the argument that the fixation of purchase price in the context of the present Act was an essential feature of the monopoly. It may be that the fixing of the said price has been provided for by section 4 in the interests of growers of Kendu leaves themselves, but that is a matter which would be relevant in considering the reasonableness of the restriction imposed by the section. But take a hypothetical case where in creating a State monopoly for purchasing a commodity like Kendu leaves, the law prescribes a purchase price at unreasonably low rate, that cannot be said to be an essential part of the State monopoly as such, and its reasonableness will have to be tested under Article 19 (1) (6). On the facts of this case and in the light of the commodity in respect of which monopoly is created, it seems difficult to hold that the State monopoly could not have functioned without fixing the purchase price. We are not suggesting that fixing prices would never be an essential part of the creation of State monopoly though, *prima facie*, it seems doubtful whether fixing purchase price can properly form an integral part of State monopoly ; what we are holding in the present case is that having regard to the scheme of the State monopoly envisaged by the Act, section 4 cannot be said to be such an essential part of the said monopoly as to fall within the expression "law relating to" under Article 19 (6). Therefore, we are satisfied that the validity of section 4 must be tested in the light of the first part of Article 19 (6) so far as the petitioner's rights under Article 19 (1) (g) are concerned, and under Article 19 (5) so far as his rights under Article 19 (1) (f) are concerned.

Thus considered, there can be no difficulty in upholding the validity of section 4. As we have just indicated, if the Legislature had allowed the State monopoly to operate without fixing the prices, it would have meant hardship to the growers and undue advantage to the State. If the ordinary law of demand and supply was allowed to govern the prices, in all probability the said prices would have worked adversely to the interests of the growers and to the benefit of the State in the case of perishable commodities like Kendu leaves. That is why the Legislature has deliberately provided for the fixation of prices and prescribed the machinery in that behalf. It is true that the prices fixed are not the minimum prices; but the fixing of minimum prices would have served no useful purpose when a State monopoly was being created and so, prices which can be regarded as fair are intended to be fixed by section 4. A representative Advisory Committee has to be appointed and it is in consultation with the advice of the said Committee that prices have to be fixed. In fact, the present prices have been fixed according to the recommendations made by the said Committee. Thus, it is clear that the object of fixing the prices was to help the growers to realise a fair price. It is nobody's case that the prices are unduly low or compare unfavourably with prices prevailing in the locality in the previous years. Therefore, we feel no hesitation in holding that restrictions in regard to the fixing of price prescribed by section 4 are reasonable and in the interests of the general public both under Article 19 (5) and Article 19 (6). The result is that the challenge to the validity of section 4 fails.

At this stage, we may refer to four decisions of this Court in which the question about the construction of Article 19 (6) has been incidentally considered. In *Saghir Ahmed v. The State of U.P. and others*¹, this Court was called upon to consider the validity of the relevant provisions of the U. P. Road Transport Act (II of 1951) and the question had to be decided in the light of Article 19 (6) as it stood be-

1. (1954) S.C.J. 819; (1955) 1 S.C.R. 707.

fore the amendment. But at the time when the judgment of this Court was pronounced, the Amendment Act had been passed, and Mukherjea, J., who spoke for the Court referred to this amendment incidentally. "The result of the amendment", observed the learned Judge,

"is that the State would not have to justify such action as reasonable at all in a Court of law and no objection could be taken to it on the ground that it is an infringement of the right guaranteed under Article 19 (1) (g) of the Constitution. It is quite true that if the present statute was passed after the coming into force of the new clause in Article 19 (6) of the Constitution, the question of reasonableness would not have arisen at all and the appellant's case on this point, at any rate, would have been unarguable." (page 727).

While appreciating the effect of these observations, however, we have to bear in mind the fact that the effect of the amendment did not really fall to be considered and the impact of the amendment in Article 19 (6) on the right under Article 19 (1) (j) has not been noticed.

In *The Parbhani Transport Co-operative Society, Ltd. v. The Regional Transport Authority, Aurangabad and others*¹, this Court has observed that Article 19 (6) by providing that nothing in Article 19 (1) (g) shall affect the application of any existing law in so far as it relates to, or prevent the State from making any law relating to the carrying on by the State of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise, would seem to indicate that the State may carry on any business either as a monopoly, complete or partial, or in competition with any citizen and that would not have the effect of infringing any fundamental rights of such citizen. It is true that the last part of the statement refers to any fundamental rights of the citizen, but that, in the context, cannot be taken to mean a decision that a right under Article 19 (1) (f) would necessarily fall within the scope of the said observation.

In *Dosa Satyanarayanamurthy etc. v. The Andhra Pradesh State Road Transport Corporation*², this Court has observed that sub-clause (ii) of Article 19 (6) is couched in very wide terms. Under it, the State can make laws for carrying on a business or service to the exclusion, complete or partial, of citizens or otherwise..... There are, therefore, no limitations on the State's power to make laws conferring monopoly on it in respect of an area, and person or persons to be excluded. (page 649).

To the same effect are the relevant observations made by this Court in the case of *H.C. Narayanappa and others v. The State of Mysore and others*³.

We must now examine the validity of the argument urged by Mr. Pathak that the Act is bad because it seeks to create a monopoly in favour of individual citizens described by the Act as 'agents'. For deciding this question, we must revert once again to the amendment made in Article 19 (6). The argument is that though the State is empowered to create State monopoly by laws the trade, in respect of which the monopoly is sought to be created must be carried on by the State or by a corporation owned or controlled by the State. There can be no doubt that though the power to create monopoly is conferred on the Legislatures in very wide terms and it can be created in respect of any trade, business, industry or service, there is a limitation imposed at the same time and that limitation is implicit in the concept of State monopoly itself. If a State monopoly is created, the State must carry on the trade, or the State may carry it on by a corporation owned or controlled by it. Thus far, there is no difficulty. Mr. Pathak, however, contends that the State cannot appoint any agents in carrying on the State monopoly, whereas the learned Attorney-General urges that the State is entitled not only to carry on the trade by itself or by its officers serving in its Departments, but also by agents appointed by it in that behalf; and in support of his argument that agents can be appointed, the learned Attorney-General suggests that persons who can be treated as agents in a commercial sense can be validly appointed by the State in working out its monopoly. We are not inclined to accept either the narrow construction pressed by

1. (1960) S.C.J. 1250 : (1960) 3 S.C.R. 177 1 S.C.R. 642.

at p. 187.
2. (1961) 1 S.C.J. 7 : (1961) 1 M.L.J. 3.

3. (1961) 1 M.L.J. (S.C.) 5 : (1961) 1 An.
W.R. (S.C.) 5 : (1961) 1 S.C.J. 7 : (1960) 3
S.C.R. 742 at p. 752.

Mr. Pathak, on the broad construction suggested by the learned Attorney-General. It seems to us that when the State carries on any trade, business or industry, it must inevitably carry it on either departmentally or through its officers appointed in that behalf. In the very nature of things, the State, as such, cannot function without the help of its servants or employees and that inevitably introduces the concept of agency in a narrow and limited sense. If the State cannot act without the aid and assistance of its employees or servants, it would be difficult to exclude the concept of agency altogether. Just as the State can appoint a public officer to carry on the trade or its business, so can it appoint an agent to carry on the trade on its behalf. Normally and ordinarily, the trade should be carried on departmentally or with the assistance of public servants appointed in that behalf. But there may be some trades or businesses in which it would be inexpedient to undertake the work of trade or business departmentally or with the assistance of State servants. In such cases, it would be open to the State to employ the services of agents, provided the agents work on behalf of the State and not for themselves. Take the case of Kendu leaves with which we are concerned in the present proceedings. These leaves are not cultivated but grow in forests and they are plucked during 3 to 4 months every year, so that the trade of purchasing and selling them is confined generally to the said period. In such a case, it may not be expedient for the State always to appoint Government servants to operate the State monopoly, and agency would be more convenient, appropriate and expedient. Thus considered, it is only persons who can be called agents in the strict and narrow sense to whom the working of the State monopoly can be legitimately left by the State. If the agent acquired a personal interest in the working of the monopoly, ceases to be accountable to the principal at every stage, is not able to bind the principal by his acts, or if there are any other terms of the agency which indicated that the trade or business is not carried on solely on behalf of the State but at least partially on behalf of the individual concerned, that would fall outside Article 19 (6) (ii). Therefore, in our opinion, if a law is passed creating a State monopoly and the working of the monopoly is left either to the State or to the Officers of the State appointed in that behalf, or to the Department of the State, or to persons appointed as agents to carry on the work of the monopoly strictly on behalf of the State, that would satisfy the requirements of Article 19 (6) (ii). In other words, the limitations imposed by the requirement that the trade must be carried on by the State or by a corporation owned or controlled by the State cannot be widened and must be strictly construed and agency can be permitted only in respect of trades or businesses where it appears to be inevitable and where it works within the well-recognised limits of agency. Whether or not the operation of State monopoly has been entrusted to an agent of this type, will have to be tried as a question of fact in each case. The relationship of agency must be proved in substance, and in deciding the question, the nature of the agreement, the circumstances under which the agreement was made and the terms of the agreement will have to be carefully examined. It is not the form, but the substance that will decide the issue. Thus considered, we do not think that section 3 is open to any challenge. Section 3 allows either the Government or an Officer of the Government authorised in that behalf, or an agent in respect of the unit in which the leaves have grown, to purchase or transport Kendu leaves. We are satisfied that the two categories of persons specified in clauses (b) and (c) are intended to work as agents of the Government and all their actions and their dealings in pursuance of the provisions of the Act would be actions and dealings on behalf of the Government and for the benefit of the Government. Mr. Pathak's contention that the persons specified in clauses (b) and (c) are intended by the Act to work on their own account seems to us to be inconsistent with the object of the section and the plain meaning of the words used in the relevant clauses. We wish to make it clear that we uphold the validity of section 3 because we are satisfied that clauses (b) and (c) of the said section have been added merely for clarification and are not intended to and do not include any forms of agency which would have been outside the provision of section 3 if the said two clauses had not been enacted. If section 3 is valid, then section 8 which authorises the appointment of agents must also be held to be valid.

In the petition, the validity of sections 5, 6 and 9 was challenged on the ground that they contravene Article 14. But as we have already mentioned, no contention has been urged before us in support of the plea that Article 14 has been contravened by any section of the Act. The petition further avers that the Act was a colourable piece of legislation, but that argument really proceeded on the basis whether the agreement entered into by the State Government with the agents to which we shall presently refer correctly represents the effect of sections 3 and 8 of the Act. So far as the Act is concerned, the two sections which were seriously challenged were sections 3 and 4, and as we have already held, the provisions in these two sections are not shown to be invalid; and so, the argument that the Act is colourable, has no substance. The notifications which were impugned have also been issued under the relevant provisions of the Act and their validity also cannot be effectively challenged once we reach the conclusion that the Act is good and valid. We have already observed that the petitioner has not specifically and clearly alleged that the price actually fixed under section 4 is grossly unfair and as such, contravenes his rights under Article 19 (1) (f). No evidence has been adduced before us to show that the price is even unreasonable. On the other hand, the counter affidavit filed by respondent No. 1 would seem to show that the price has been fixed in accordance with the recommendations made by the Advisory Committee and it does not compare unfavourably with the prices prevailing in the past in this locality in respect of Kendu leaves. Therefore, the main grounds on which the petitioner came to this Court to challenge the validity of the Act fail.

There are however, two other points which have been urged before us and on which the petitioner is entitled to succeed. The first ground relates to the agreement actually entered into between respondent No. 1 and the agents. This agreement consists of ten clauses and it has apparently been drawn in accordance with rule 7 (5) of the Rules framed under the Act. It appears that on the 9th January, 1962, the Rules framed by the State Government by virtue of the power conferred on it by section 18 of the Act were published. Rule 7 deals with appointment of Agent. Rule 7 (2) prescribes the Form in which an application for appointment as agent has to be made. Rule 7 (5) provides that on appointment as agent the person appointed shall execute an agreement in such form as Government may direct within ten days of the date of receipt of the order of appointment failing which the appointment shall be liable to cancellation and the amount deposited as earnest money shall be liable to forfeiture. It is significant that though the Form for an application which has to be made by a person applying for agency is prescribed, no Form has been prescribed for the agreement which the State Government enters into with the agent. The agreement is apparently entered into on an *ad hoc* basis and that clearly is unreasonable. In our opinion, if the State Government intends that for carrying on the State monopoly authorised by the Act agents must be appointed, it must take care to appoint agents on such terms and conditions as would justify the conclusion that the relationship between them and the State Government is that of agent and principal; and if such a result is intended to be achieved, it is necessary that the principal terms and conditions of the agency agreement must be prescribed by the Rules. Then it would be open to the citizens to examine the said terms and conditions and challenge their validity if they contravene any provisions of the Constitution, or are inconsistent with the provisions of the Act itself. Therefore, we are satisfied that the petitioner is entitled to contend that rule 7 (5) is bad in that it leaves it to the sweet will and pleasure of the Officer concerned to fix any terms and conditions on an *ad hoc* basis, that is beyond the competence of the State Government and such terms and conditions must be prescribed by the Rules made under section 18 of the Act.

That takes us to the terms and conditions of the agreement which has been produced before us. These terms indicate a complete confusion in the mind of the person who drafted them. Some of them are terms which would be relevant in the case of agency, while others would be relevant and material if a contract of Government forest was made in-favour of the party signing those conditions; and

some others would indicate that the person appointed as an agent is not an agent at all but is a person in whom personal interest is created in carrying on the so-called agency work. Clause 4 of the agreement provides for the payment which the agent has to make in respect of the Kendu leaves from private lands as well as from Government lands. It is not easy to appreciate the precise scope of the provisions of the respective sub-clauses of clause 4 and their validity. But, on the whole, it does appear that after the agent makes the payment prescribed by the relevant clauses to the Government, he is likely to keep some profit to himself; and that would clearly show that the relationship is not of the type which is permissible under Article 19 (6) (ii). Under clause 4 (iii) the agent has to pay a sum of Rs. 5 per bag to the Government as consideration for being permitted by Government to enter into and collect leaves from Government lands and forests. It is remarkable that in the absence of any specific rule, the amount to be paid per bag can be determined differently from place to place and that it is a serious anomaly. It is also not clear how this amount of Rs. 5 per bag has been determined, and in the absence of any explanation it would be difficult to accept the plea of the learned Attorney-General that this amount has been fixed after making calculations about the profits which the agent was likely to secure and the price which the total produce of the forest was likely to acquire on an average basis. Under clause 4 (v), it is conceded that the agent would be entitled to make some profits in some cases. Clause 4 (vi) entitles the agent to claim deductions for the expenses and commission that he may be entitled to in respect of the number of bags of processed leaves; and it requires him to pay to Government the profits accruing from the trading in the leaves collected in four equal instalments in the manner specified. Under clause 4 (ix) the agent has to finance all transactions involved in purchase, collection, storage, processing, transport and disposal of the Kendu leaves purchased or collected in the Unit. Then there are certain sub-clauses under this clause which would be appropriate if it was a matter of a contract between the Government and a forest contractor. Clause 4 (ix) (i) requires the agent to keep a register of daily accounts. Under clause 4 (ix) (p) during the subsistence of the agreement, the agent is responsible for the disposal of the Kendu leaves collected or purchased by him and the Government shall not bear any liability whatsoever, except as indicated in sub-clause (vii) of clause 4 (ix).

Clause 6 provides that subject to other terms and conditions, all charges and outgoings shall be paid by the agent and he shall not be entitled to any compensation whatsoever for any loss that may be sustained by reasons of fire, tempest, disease, pest, flood, draught or other natural calamity, or by any wrongful act committed by any third party or for any loss sustained by him through any operation undertaken in the interest of fire conservancy. This clause clearly shows that the agent becomes personally liable to bear the loss which, under the normal rules of agency, the principal would have to bear. We have not thought it necessary to refer to all the clauses in detail because we are satisfied that even if the agreement is broadly considered, it leaves no room for doubt that the person appointed under the agreement to work the monopoly of the State is not an agent in the strict and narrow sense of the term contemplated by Article 19 (6) (ii). The agent appointed under this agreement seems to carry on the trade substantially on his own account, subject, of course, to the payment of the amount specified in the contract. If he makes any profit after complying with the said terms, the profit is his; if he incurs any loss owing to circumstances specified in clause 6, the loss is his. In terms, he is not made accountable to the State Government; and in terms, the State Government is not responsible for his actions. In such a case, it is impossible to hold that the agreement in question is consistent with the terms of section 3 of the Act. No doubt, the learned Attorney-General contended that in commercial transactions, the agreement in question may be treated as an agreement of agency, and in support of this argument he referred us to the decisions in *Ex parte Bright*, *In re Smith*¹, and *Weiner v. Harris*². It is true that an agent is entitled to commission in commercial

1. (1879) L.R., 10 Ch. D. 566.

2. L.R. (1910) 1 K. B. Divn. 285.

transactions and so the fact that a person earns commission in transactions carried on by him on behalf of another would not destroy his character as that other person's agent. Cases of *del credere* agents are not unknown to commercial law. But we must not forget that we are dealing with agency which is permissible under Article 19 (6) (ii), and as we have already observed, agency which can be legitimately allowed under Article 19 (6) (ii) is agency in the strict and narrow sense of the term; it includes only agents who can be said to carry on the monopoly at every stage on behalf of the State for its benefit and not for their own benefit at all. All that such agents would be entitled to, would be remuneration for their work as agents. That being so, the extended meaning of the word "agent" in a commercial sense on which the learned Attorney-General relies is wholly inapplicable in the context of Article 19 (6) (ii). Therefore, we must hold that the agreement which has been produced before us is invalid inasmuch as it is wholly inconsistent with the requirements of section 3 (1) (c).

The result is, the petitioner succeeds only partially inasmuch as we have held that rule 7 (5) is bad and the agreement is invalid, and that means that the State Government cannot implement the provisions of the Act with the assistance of Agents appointed under the said invalid agreement. We accordingly direct that a direction or order to that effect should be issued against the State Government. The main contentions raised by the petitioner against the validity of the Act and its relevant provisions on which specific reliefs were claimed, however, fail. The petition is accordingly partially allowed. There would be no order as to costs.

K.L.B.

Petition allowed in part.

THE SUPREME COURT OF INDIA.

PRESENT :—MR. B. P. SINHA, *Chief Justice*, S. K. DAS, P. B. GAJENDRA-GADKAR, A. K. SARKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Reference by The President of India Under Article 143 (1) of the Constitution Regarding the Proposed Amendments to Sub-section (2) of Section 20 of the Sea Customs Act, 1878 (VIII of 1878) and Sub-section (1-A) of Section 3 of the Central Excises and Salt Act, 1944 (1 of 1944).

Constitution of India (1950), Article 289—Scope—State immunity from Union taxation—Scope of—Constitutional exemption of State property—Whether extends to trading taxes on State property—Distinction between direct and indirect taxes on property and income—Customs and Central excise duties—Nature of—Levy of duties on State Government goods used for State Government trade—Proposed levy on all State Government goods—Constitutional validity—Sea Customs Act (VIII of 1878), section 20 (2)—Central Excises and Salt Act (1 of 1944), section 3.

Under the Sea Customs Act, 1878 customs duties on the import and export of goods belonging to a State Government were leviable only in cases where such goods were used for the purposes of a trade or business carried on by or on behalf of that Government. Likewise, under the Central Excise and Salt Act, 1944, excise duty was leviable on all excisable goods, excepting salt, produced or manufactured by a State Government only in cases where such goods were used for the purposes of a trade or business carried on by, or on behalf of, that Government. The Union Government proposed to amend these provisions and levy customs duties and Central excise duties on the State Government irrespective of whether or not the goods in question were used for the purposes of a trade or business of the State Government. Doubts, however, were expressed by certain State Governments as to the validity of the amendments proposed, on the ground that they were inconsistent with Article 289 of the Constitution of India. On a Reference by the President under Article 142 (1),—

Held, (By majority, B. P. Sinha, C.J., P. B. Gajendragadkar, K. N. Wanchoo, J. C. Shah and N. Rajagopala Ayyangar, JJ.) that the amendments proposed are not inconsistent with Article 289 of the Constitution.

The taxable event in the case of duties of excise is the manufacture of goods. The duty is not directly on the goods, but on the manufacture thereof. Duties of excise partake of the nature of indirect taxes and are to be distinguished from direct taxes, like taxes on property and income. Similarly, in the case of duties of customs, including export duties, though they are levied with reference to goods, the taxable event is the import within or export outside customs barriers. They are also indirect taxes like excise, and cannot be equated with direct taxes on goods themselves.

(ii) that customs duties are taxes on the import or export of property and not taxes on property as such and further that excise duties are taxes on the production or manufacture of property and not taxes on property as such ; and

(iii) that the Union is not precluded by the provisions of Article 289 of the Constitution of India from imposing or authorising the imposition of customs duties on the import or export of the property of a State and other Union taxes on the property of a State which are not taxes on property as such ;

And whereas doubts have arisen as to the true interpretation and scope of Article 289 of the Constitution of India and, in particular, as to the constitutional validity of the amendments to the Sea Customs Act, 1878 (Act VIII of 1878) and the Central Excises and Salt Act, 1944 (Act 1 of 1944) as proposed in the aforesaid Draft Bill ;

And whereas in view of what has been hereinbefore stated, it appears to me that the questions of law hereinafter set out have arisen and are of such a nature and are of such public importance that it is expedient to obtain the opinion of the Supreme Court of India thereon ;

Now, therefore, in exercise of the powers conferred upon me by clause (1) of Article 143 of the Constitution of India, I, Rajendra Prasad, President of India, hereby refer the following questions to the Supreme Court of India for consideration and report of its opinion thereon :

"(1) Do the provisions of Article 289 of the Constitution preclude the Union from imposing, or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that Article ?

(2) Do the provisions of Article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that Article ?

(3) Will sub-section (2) of section 20 of the Sea Customs Act, 1878 (Act VIII of 1878) and sub-section (1-A) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944) as amended by the Bill set out in the Annexure be inconsistent with the provisions of Article 289 of the Constitution of India ?"

New Delhi,
19th April, 1962.

(Sd.) Rajendra Prasad
President of India.

Annexure
DRAFT BILL
A
BILL

Further to amend the Sea Customs Act, 1878, and the Central Excises and Salt Act, 1944.

Be it enacted by Parliament in the.....th year of the Republic of India as follows :—

1. *Short title.*—This Act may be called THE SEA CUSTOMS AND CENTRAL EXCISES (AMENDMENT) ACT, 19.....

2. *Amendment of section 20, Act (VIII of 1878).*—In section 20 of the Sea Customs Act, 1878 for sub-section (2) the following sub-section shall be substituted, namely :—

"(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government as they apply in respect of goods not belonging to the Government."

3. *Amendment of section 3, Act (1 of 1944).*—In section 3 of the Central Excises and Salt Act, 1944, for sub-section (1-A) the following sub-section shall be substituted, namely :—

"(1-A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government as they apply in respect of goods which are not produced or manufactured by the Government."

It has been argued on behalf of the Union of India that clause (1) of Article 289 properly interpreted would mean that the immunity from taxation granted by the Constitution to the States is only in respect of tax *on* property and *on* income, and that the immunity does not extend to all taxes ; the clause should not be interpreted so as to include taxation *in relation to* property ; a tax by way of import or export duty is not a tax on property, but is on the fact of importing or exporting goods into or out of the country ; similarly, an excise duty is not a tax on property, but is a tax on production or manufacture of goods ; though the measure of the tax may have reference to the value, weight or quantity of the goods according to the relevant provisions of the statute imposing excise duty, in essence, and truly speaking, import or export duties or excise duty are not taxes on property, including goods, as such, but on the happening of a certain event in relation to goods, namely, import or export of goods or production or manufacture of goods ; the true meaning of Article 289 is to be derived not only from its language, but also from the scheme of the Indian Constitution distributing powers of taxation between the Union and the States, and the context of those provisions ; Articles 285 and 289 of the Constitution are complementary, and the true construction of the one has a direct bearing on

that of the other ; those articles have to be construed in the background of the corresponding provisions of the Government of India Act, 1935, sections 154 and 155; clause (2) of Article 289 is only explanatory and not an exception to clause (1) in the sense that the entire field of taxation covered by clause (1) is also covered by the terms of clause (2) ; as Parliament has exclusive power to make laws with respect to trade and commerce with foreign countries and with respect to duties of customs, including export duties and duties of excise on certain goods manufactured or produced in India, the Union is competent to impose or to authorise the imposition of customs duties on the import or export of goods by a State which may be its property or excise duty on the production or manufacture of goods by a State ; if clause (1) of Article 289 were to be interpreted as including the exemption of a State in respect of customs duties or excise duty, it will amount to a restriction on the exclusive competence of Parliament to make laws with respect to trade and commerce—a restriction which is not warranted in view of the scheme of the Constitution ; that the term “ taxation ” has been used in a very wide sense, as per Article 366 (28) ; the wide sweep of that expression has to be limited with respect to the words “ property ” or “ income ” ; the juxtaposition of the words “ property ” and “ income ” in clause (1) of Article 289 would show that the exemption of the States from Union taxation was only in respect of tax on property and tax on income ; in other words, the exemption granted by Article 289 (1) is in respect of property taxes, properly so called, in the sense of taxes directly on property ; a tax on property means a tax in respect of ownership, possession or enjoyment of property, in contradistinction to customs duties and duties of excise, which, in their true meaning, are not taxes *on* property but only *in relation to* property, on a particular occasion ; clause (2) of Article 289 of the Constitution shows clearly that trade or business carried on by States will be liable to taxation ; by clause (3) of Article 289 Parliament has been authorised to legislate as to what trade or business would be incidental to the ordinary functions of Government and which, therefore, would not be subject to taxation by the Union ; and trade or business not so declared by Parliament will be within the operation of clause (2) *i.e.* liable to Union taxation.

On the other hand, it is argued on behalf of the States that in interpreting Article 289 of the Constitution, on which the answer to the question referred by the President depends, it has to be borne in mind that our Constitution does not make a distinction between direct and indirect taxation ; that trade and commerce and industry have been distributed between the Union and the States ; that the power of taxation is different from the power to regulate trade and commerce ; that the narrower construction of the Article, contended for on behalf of, the Union, will seriously and adversely affect the activities of the States and their powers under the Constitution ; that a comparison and contrast between the terms of section 155 of the Government of India Act and those of Article 289 of the Constitution would clearly emphasize that the wider meaning contended for on behalf of the States should be preferred ; that the legislative practice in respect of excise and customs duties is a permissible guide to the interpretation of the Article in question and would support the wider construction, and that even on a narrower construction insisted upon by the Union, customs duties and duties of excise affect property and are, therefore, within the immunity granted by Article 289 (1) ; properly construed, Article 289 (1) grants complete immunity from all taxation on any kind of property ; and any kind of tax *on* property or *in relation to* property is within the immunity ; therefore, the distinction sought to be made on behalf of the Union between tax *on* property and tax *in relation to* property is wholly irrelevant ; clause (2) of Article 289 is not explanatory, as contended on behalf of the Union, but is an exception or in the nature of a proviso to clause (1) of the Article ; clause (2) really carves out something which is included in clause (1) and similarly clause (3) is an exception to clause (2) and carves out something which is included in clause (2).

It should be noted that all the States which were represented before us were agreed in their contention, as set out above, except the State of Maharashtra. The learned Counsel for the State of Maharashtra agreed with the contention on behalf of the Union that there was a clear distinction between tax on property and excise

duties. In other words, excise duty is not within the immunity granted by clause (1) of Article 289, which is in the nature of an exception to the general power of a State to regulate trade and commerce and its right to tax, and as such it should be very strictly construed. But he supported the other States in so far as they contended that duties of import and export were within the exemption granted by clause (1) of Article 289.

It will thus be seen that whereas the Union is for interpreting clause (1) of Article 289 in the restricted sense of the immunity being limited to a direct tax on property and on the income of a State, the States contend for an all-embracing exemption from the Union taxes which have any relation to or impact on State property and income. In spite of this wide gulf between the two view points, both are agreed that the terms "property", "income" and "tax" have been used in their widest sense. They are also agreed that the immunity granted to the Union in respect of its property by Article 285 corresponds to the immunity granted to the States by Article 289, and that, therefore, the term "property", "taxation" and "tax" have to be interpreted in the same comprehensive sense in both the Articles. It will be noticed that whereas not only the term "property" but also "income" occurs in Article 289, in Article 285 the term "income" is not used apparently because the Constitution-makers were aware of the legal position that tax on "income" (as distinct from agricultural income) is exclusively in the Union List and was so even before the advent of the Constitution. It was agreed, and it is manifest that the terms of Articles 285 and 289 are very closely parallel to those of sections 154 and 155, respectively, of the Government of India Act, 1935 (25 and 26, Geo. V., c. 42), except for the differences in expression occasioned by the change in the constitutional position and the integration of the Indian States after 1947. The language of the two parallel provisions may be set out below in order to bring out the points of similarity and contrast :

Government of India Act.

Section 154.—Property vested in His Majesty for purposes of the Government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any Authority within, a Province or Federated State :

Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto.

Section 155 (1).—Subject as hereinafter provided the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India, or income accruing, arising or received in British India.

Provided that—

- (a) where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof ;
- (b) nothing in this sub-section shall exempt a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

Constitution of India.

Article 285 (1).—The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any Authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any Authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

Article 289 (1).—The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business which Parliament may by law declare to be incidental to the ordinary functions of Government.

- (2) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this Act by the Ruler of an Indian State in respect of any Indian Government Securities issued before the date.

It will thus appear that both section 154 and Article 285 set out above speak only of "property" and lay down that property vested in the Union shall be exempt from all taxes imposed by a State or by any authority within a State, subject to one exception of saving the pre-existing taxes on such property until Parliament may by law otherwise provide. Similarly, whereas section 155 of the Government of India Act exempts from federal taxes the Government of a Province in respect of lands or buildings situate in British India or income accruing, arising or received in British India, Article 289 (1) says "the property and income of a State shall be exempt from Union taxation". Section 155 aforesaid has two provisos (a) and (b); (a) relating to trade or business of any kind carried on by or on behalf of the Government of a Province, and (b) which is not relevant, relating to a Ruler. It will be seen that "income" is repeated in both the provisions, but what was "lands or buildings" has become simply "property" in Article 289 (1).

The question naturally arises why "income" was at all mentioned when it is common ground that "income" would be included in the generic term "property." It was suggested on behalf of the Union that the juxtaposition of the terms "property" and "income" of a State which have been declared to be exempt from Union taxation would indicate that the tax from which they were to be immune was tax on "property" and on "income", i.e., in both cases a direct tax, and not an indirect tax, which may be levied in relation to the property of a State, namely, excise duty, which is a tax on the manufacture or production of goods and customs duty which is a tax on the event of importation or exportation of goods.

Before dealing with the argument on either side, whether the restricted meaning attributed to the words of Article 289 (1) on behalf of the Union, or the wider significance claimed for those words on behalf of the States, was intended by the Constitution-makers, it is necessary to bear in mind certain general considerations and the scheme of the constitutional provisions bearing on the power of the Union to impose the taxes contemplated by the proposed legislation.

Neither the Union nor the States can claim unlimited right as regards the area of taxation. The right has been hedged in by considerations of respective powers and responsibilities of the Union in relation to the States, and those of the States in relation to citizens or *inter se* or in relation to the Union. Part XII of the Constitution relates to "Finances etc." At the very outset Article 265 lays down that no tax shall be levied or collected except by authority of law. That authority has to be found in the three Lists in the Seventh Schedule, subject to the provisions of Part XI which deals with the relations between the Union and the States, particularly Chapter I relating to legislative relations and distribution of legislative powers, with special reference to Article 246. Under that Article, the Legislature of a State has exclusive powers to make laws with respect to the matters enumerated in List II, and Parliament and the Legislature of a State have powers to make laws with respect to the matters enumerated in List III (the Concurrent List), and notwithstanding those two lists, Parliament has the exclusive power to make laws with respect to any of the matters enumerated in List I (the Union List). Parliament also has power to make laws with respect to any of the matters enumerated in the State List with respect to any part of the territory of India which is not included in a State. By Article 248 Parliament has been vested with exclusive power to make laws with respect to any matters not enumerated in the State List or the Concurrent List, including the power of making a law imposing a tax not mentioned in either of those lists. It is not necessary to refer to the extended power of legislation vested in Parliament in abnormal circumstances, as contemplated by Articles 249, 250 and 252. In short, though the States have been vested with exclusive powers of legislation with respect to the matters enumerated in List II, the authority of Parliament to legislate in respect of taxation in List I is equally exclusive.

The scheme of distribution of powers of legislation, with particular reference to taxation, is that Parliament has the exclusive power to legislate imposing taxes on income other than agricultural income (Entry 82); duties of customs including export duties (Entry 83); duties of excise on tobacco and other goods manufactured or produced in India, except alcoholic liquors for human consumption and opium, Indian hemp and other narcotic drugs and narcotics, which by Entry 51 of List II is vested in the State Legislature (Entry 84). It is not necessary to refer to the other taxes which Parliament may impose because they have no direct bearing on the questions in controversy in this case. Similarly, the State Legislatures have the power to impose taxes on agricultural income (Entry 46), taxes on lands and buildings (Entry 48) and duties of excise on alcoholic liquors and opium, etc., manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India (Entry 51). It is also not necessary to refer to other heads of taxes which are contained in the State List. It would, thus appear that whereas all taxes on income, other than agricultural income, are within the exclusive power of the Union, taxes on agricultural income only are reserved for the States. All customs duties, including export duties, relating as they do to transactions of import into or export out of the country are within the powers of Parliament. The States are not concerned with those. They are only concerned with taxes on the entry of goods in local areas for consumption, use or sale therein, covered by Entry 52 in the State List. Except for duties of excise on alcoholic liquors and opium and other narcotic drugs, all duties of excise are leviable by Parliament. Hence, it can be said that by and large, taxes on income, duties of customs and duties of excise are within the exclusive power of legislation by Parliament.

Those exclusive powers of taxation, as aforesaid vested in Parliament, have to be correlated with the exclusive power of Parliament to legislate with respect to trade and commerce with foreign countries; import and export duties across customs frontiers; definition of customs frontiers (Entry 41); inter-State trade and commerce (Entry 42). As the regulation of trade and commerce with foreign countries, as also inter-State, is the exclusive responsibility of the Union, Parliament has the power to legislate with respect to those matters, along with the power to legislate by way of imposition of duties of customs in respect of import and export of goods as also to impose duties of excise on the manufacture or production in any part of India in respect of goods other than alcoholic liquors and opium, etc., referred to above. Further, the imposition of customs duties or excise duties may be either (1) with a view to raise revenue or (2) to regulate trade and commerce, both inland and foreign, or (3) both to regulate trade and commerce and to raise revenue. If therefore Article 289 (1) completely exempts all property of the States from all taxes, the power of Parliament to regulate foreign trade by the use of its power of taxation would be seriously impaired and this consideration will have to be kept in mind when interpreting Article 289 (1).

There is another general consideration which has also to be borne in mind in view of the provisions contained in Part XII of the Constitution. Though various taxes have been separately included in List I or List II and there is no overlapping in the matter of taxation between the two Lists and there is no tax provided in the Concurrent List except stamp duties (Item 44), the Constitution embodies an elaborate scheme for the distribution of revenue between the Union and the States in Part XII, with respect to taxes imposed in List I. The scheme of the Constitution with respect to financial relations between the Union and the States, devised by the Constitution-makers, is such as to ensure an equitable distribution of the revenue between the Centre and the States. All revenues received by the Government of India normally form part of the Consolidated Fund of India, and all revenues received by the Government of a State shall form part of the Consolidated Fund of the State. This general rule is subject to the provisions of the Chapter I of Part XII in which occur Articles 266 to 277. Though stamp duties and duties of excise on medicinal and toilet preparations, which are covered by the Union List, are to be levied by the Government of India, they have to be collected by the States within which such duties are leviable, and are not to form part of the Consolidated Fund.

of India, but stand assigned to the State which has collected them (Article 268). Similarly, duties and taxes levied and collected by the Union in respect of Succession Duty, Estate Duty, Terminal Taxes on goods and passengers carried by railway, sea or air, taxes on rail fares and freights, etc., as detailed in Article 269 shall be assigned to the States and distributed amongst them in accordance with the principles of distribution as may be formulated by Parliamentary legislation, as laid down in clause (2) of Article 269. Article 270 provides that taxes on income, other than agricultural income, shall be levied and collected by the Government of India and distributed between the Union and the States. The taxes and duties levied by the Union and collected by the Union or by the States as contemplated by Articles 268, 269 and 270 and distributed amongst the States shall not form part of the Consolidated Fund of India. Further, excise duties which are levied and collected by the Government of India and which form part of the Consolidated Fund of India may also be distributed amongst the States, in accordance with the principles laid down by Parliament in accordance with the provisions of Article 272. Express provision has been made by Article 273 in respect of grants-in-aid of the revenue of the States of Assam, Bihar, Orissa and West Bengal in lieu of assignment of any share of the net proceeds of export duty on jute and jute products. Further, a safeguard has been laid down in Article 274 that no Bill or Amendment which imposes or varies any tax or duty in which States are interested or which affects the principles of distribution of duties or taxes amongst the States as laid down in Articles 268-273 shall be introduced or moved in either House of Parliament except on the recommendation of the President. Parliament has also been authorised to lay down that certain sums may be charged on the Consolidated Fund of India in each year by way of grants-in-aid of the revenues of such States as it may determine to be in need of assistance. This aid may be different for different States, according to their needs, with particular reference to schemes of development for the purposes indicated in Article 275 (1).

Provision has also been made by Article 280 for the appointment by the President of a Finance Commission to make recommendations to the President as to the distribution amongst the Union and the States of the net proceeds of taxes and duties as aforesaid, and as to the principles which should govern the grants-in-aid of the revenue of the States out of the Consolidated Fund of India.

It will thus appear that Part XII of the Constitution has made elaborate provisions as to the revenues of the Union and of the States, and as to how the Union will share the proceeds of duties and taxes imposed by it and collected either by the Union or by the States. Sources of revenue which have been allocated to the Union are not meant entirely for the purposes of the Union, but have to be distributed according to the principles laid down by Parliamentary legislation as contemplated by the Articles aforesaid. Thus, all the taxes and duties levied by the Union and collected either by the Union or by the States do not form part of the Consolidated Fund of India, but many of those taxes and duties are distributed amongst the States and form part of the Consolidated Fund of the States. Even those taxes and duties which constitute the Consolidated Fund of India may be used for the purposes of supplementing the revenues of the States in accordance with their needs. The question of the distribution of the aforesaid taxes and duties amongst the States and the principles governing them, as also the principles governing grants-in-aid of revenues of the States out of the Consolidated Fund of India, are matters which have to be decided by a high-powered Finance Commission, which is a responsible body designated to determine those matters in an objective way. It cannot, therefore, be justly contended that the construction of Article 289 suggested on behalf of the Union will have the effect of seriously and adversely affecting the revenues of the States. The financial arrangement and adjustment suggested in Part XII of the Constitution has been designed by the Constitution-makers in such a way as to ensure an equitable distribution of the revenues between the Union and the States even though those revenues may be derived from taxes and duties imposed by the Union and collected by it or through the agency of the States. On the other hand, there may be more serious difficulties in the way of the Union if we were to adopt the very wide interpretation suggested on behalf of the States. It will thus be seen

that the powers of taxation assigned to the Union are based mostly on considerations of convenience of imposition and collection and not with a view to allocate them solely to the Union ; that is to say, it was not intended that all taxes and duties imposed by the Union Parliament should be expended on the activities of the Centre and not on the activities of the States. Sources of revenue allocated to the States, like taxes on land and other kinds of immovable property, have been allocated to the States alone. The Constitution-makers realised the fact that those sources of revenue allocated to the States may not be sufficient for their purposes and that the Government of India would have to subsidise their welfare activities out of the revenues levied and collected by the Union Government. Realising the limitations on the financial resources of the States and the growing needs of the community in a welfare State, the Constitution has made, as already indicated, specific provisions empowering Parliament to set aside a portion of its revenues, whether forming part of the Consolidated Fund of India or not, for the benefit of the States, not in stated proportions but according to their needs. It is clear, therefore, that considerations which may apply to those Constitutions which recognise water-tight compartments between the revenues of the federating States and those of the Federation do not apply to our Constitution which does not postulate any conflict of interest between the Union on the one hand and the States on the other. The resources of the Union Government are not meant exclusively for the benefit of the Union activities ; they are also meant for subsidising the activities of the States in accordance with their respective needs, irrespective of the amounts collected by or through them. In other words, the Union and the States together form one organic whole for the purposes of utilisation of the resources of the territories of India as a whole.

Bearing the scheme of our Constitution in mind let us now turn to the words of Article 289 and also its complementary Article, namely, Article 285. The contention on behalf of the Union is that when Article 289 provides for exemption of the property and income of a State from Union taxation, it only provides for exemption from such tax as may be levied directly on property and income and not from all Union taxes, which may have some relation to the property or income of a State. On the other hand, the contention on behalf of the States is that when Article 289 (1) provides for exemption of the property and income of a State from Union taxation it completely exempts the property and income of a State from all Union taxation of whatsoever nature it may be. So far as exemption of income is concerned, there is no serious dispute that the exemption there is with respect to taxes on income other than agricultural income (Item 82, List I), for the simple reason that the only tax provided in List I with respect to income is in Item 82 of List I. The dispute is mainly with respect to taxes on "property". Now this fact in our opinion has an important bearing on the nature of taxation of "property" which is exempt under Article 289 (1). If the income of a State is exempt only from taxes on income, the juxtaposition of the words "property and income" in Article 289 (1) must lead to the inference that property is also exempt only from direct taxes on property. But it is said that there is no specific tax on property in List I and it is therefore contended on behalf of the States that when property of a State was exempted from Union taxation, the intention of the Constitution-makers must have been to exempt it from all such taxes which are in any way related to property. Therefore, it is urged that the exemption is not merely from taxes directly on property as such but from all taxes which impinge on property of a State even indirectly, like customs duties, or export duties or excise duties. It is true that List I contains no tax directly on property like List II, but it does not follow from that that the Union has no power to impose a tax directly on property under any circumstances. Article 246 (4) gives power to Parliament to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. This means that so far as Union territories are concerned Parliament has power to legislate not only with respect to Items in List I but also with respect to Items in List II. Therefore, so far as Union territories are concerned, Parliament has power to impose a tax directly on property as such. It cannot therefore be said that the exemption of States' property from Union taxation directly on property under Article 289 (1) would be meaningless as Parliament has no power to

impose any tax directly on property. If a State has any property in any Union territory that property would be exempt from Union taxation on property under Article 289 (1). The argument therefore that Article 289 (1) cannot be confined to tax directly on property because there is no such tax provided in List I cannot be accepted.

Now the words in Article 289, confining ourselves to "property", are that "the property of a State shall be exempt from Union taxation". It is remarkable that the word "all" does not govern the words "Union taxation" in Article 289 (1). It does not provide that the property of a State shall be exempt from all Union taxation. The question therefore is whether when Article 289 provides for the exemption of State property from Union taxation, it only provides for exemption from that kind of Union taxation which is a tax directly on property. It is true that Article 289 (1) does not specifically say that the property of a State shall be exempt from Union taxation on property. It may however be properly inferred that that was the intention if one looks to the language of Article 289 (2). That clause mainly deals with income accruing or arising to a State from trade or business carried on by it. At the same time it provides that where the State is carrying on a trade or business nothing in clause (1) shall prevent the Union from imposing any tax to such extent as Parliament may by law provide in respect of any property used or occupied for the purposes of such trade or business, and the authority thus given to Parliament to tax property used or occupied in connection with trade or business can only refer to a tax directly on property as such, which is used or occupied for business, the tax being related to the use or occupation of the property. The meaning will be clearer if we look to Article 285. Clause (1) of that Article provides that the property of the Union shall be exempt from all taxes imposed by a State or by any Authority within a State. *Prima facie* the use of the words "all taxes" in clause (1) would suggest that the property of the Union would be exempt from all taxes of whatsoever nature, which a State can impose. But if one looks to clause (2) of Article 285 the nature of taxes from which the property of the Union would be exempt is clearly indicated as a tax on property. Clause (2) provides that

"nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable so long as that tax continues to be levied in that State".

It will in our opinion be permissible in view of clause (2) to read clause (1) of Article 285 when it speaks of all taxes as relating to taxes of the nature of taxes directly on property. We have already pointed out, when dealing with the general considerations which should govern the interpretation of Article 289 (1) that the power of the Union would be crippled if Article 289 is interpreted as exempting the property of a State from all Union taxes. We have also pointed out that even though the taxes may be collected and levied by the Union, there are provisions in Part XII for the assignment or distribution of many Union taxes to the States. There are also provisions for grants-in-aid by the Union from the Consolidated Fund of India to a State. In these circumstances it would, in our opinion, be in consonance with the scheme of the Constitution relating to taxation to read Article 289 (1) as laying down that the property and income of a State shall be exempt from Union taxation *on property and income*. There is, in our opinion, better warrant for reading these words "on property and income" after the words "Union taxation" in Article 289 (1) in view of the scheme of our Constitution relating to taxation and also the provisions of Part XII thereof than to read the word "all" before the words "Union taxation" in that clause. The effect of reading the word "all" before the words "Union taxation" would, in our opinion, be so serious and so crippling to the resources, which the Constitution intended the Union to have, as to make it impossible to give that intention to the words of clause (1) of Article 289. On the other hand, the States would not be so seriously affected if we read the words "on property and income" after the words "Union taxation" in Article 289 (1), for unlike other Constitutions there is provision in Part XII of our Constitution for assignment or distribution of taxes levied and collected by the Union to the States and also for grants-in-aid from the

Union to the States, so that the burden which may fall on the States by giving a restrictive meaning to the words used in clause (1) of Article 289 would be alleviated to a large extent in view of the provisions in Part XII of the Constitution for assignment and distribution of taxes levied by the Union to the States and also for grants-in-aid from the Union to the States.

Further, it must not be forgotten that Articles 285 and 289 are successors of sections 154 and 155 of the Government of India Act, though there are differences in detail between them, in particular clause (2) of Article 285, which corresponds to the Proviso to section 154, seems in our opinion to make it clear by the change in the language, that clause (1) of Article 285, when it speaks of all taxes, is referring to taxes on property of which clause (2) definitely permits continuance provided such property of the Union immediately before the commencement of the Constitution was liable or was treated as liable to such tax. As to Article 289 (1), a change has been made in the words, for section 155 (1), which corresponded thereto, provided that the Government of a Province shall not be liable to Federal taxation in respect of lands or buildings. Article 289, on the other hand, refers not only to lands and buildings but to all property of a State, whether movable or immovable and exempts it from Union taxation. Even so, we find no warrant for interpreting clause (1) of Article 289 as if it exempts all property of a State from all Union taxation. We are therefore of opinion, reading Article 289 and its complementary Article 285 together, that the intention of the Constitution-makers was that Article 285 would exempt all property of the Union from all taxes on property levied by a State or by any authority within the State while Article 289 contemplates that all property of the States would be exempt from all taxes on property which may be leviable by the Union. Both the Articles in our opinion are concerned with taxes directly either on income or on property and not with taxes which may indirectly affect income or property. The contention therefore on behalf of the Union that these two Articles should be read in the restricted sense of exempting the property or income of a State in one case and the property of the Union in the other from taxes directly either on property or on income as the case may be, is correct.

In this connection, it is pertinent to refer to certain decisions of the High Court of Australia, the Supreme Court of Canada, and the Privy Council bearing on the construction of similar, though not identical, provisions in the Constitutions of Australia and Canada.

The corresponding provisions of the Canadian Constitution are contained in sections 91, 92 and 125 of the British North America Act, 1867 (30-31 Vict. c. 3). The relevant portion of section 91 is as follows :—

"It shall be lawful for the Queen to make laws for the peace, order and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated ; that is to say :

.....
(2) The regulation of Trade and Commerce ;

(3) The raising of money by any mode or system of taxation."

Section 92 provides for exclusive powers of the Province including direct taxation within the Province in order to the raising of revenue for Provincial purposes.

Section 125 is in these terms :—

"No lands or property belonging to Canada or any Province shall be liable to taxation."

It will thus be seen that the above-quoted section runs very parallel to the provisions of Article 289 (1) of our Constitution. These provisions of the Canadian Constitution have come up for consideration before the Supreme Court of Canada, as also before the Judicial Committee of the Privy Council on a number of occasions. In the case of the *Attorney-General of The Province of British Columbia v. The Attorney-General of the Dominion of Canada*¹, the question arose whether the Province of British Columbia could import liquors into Canada for the purposes of sale, pursuant

to the provisions of the Government Liquor Act (11 Geo. V, c. 30) without payment of customs duties imposed by the Dominion of Canada. It was argued, as has been argued before us, that the word "tax" was wide enough to include the imposition of customs duties, and that the word "property" in section 125 included property of all kinds. The answer given by the Dominion was that customs duties did not constitute taxes within the meaning of the expression used in section 125 but were merely in the nature of regulation of trade and commerce, and secondly, assuming that customs duties were included in the expression "taxation", they did not constitute taxation on property. It was also contended on behalf of the Dominion that the word "taxation" in section 125 was not intended to comprehend customs duties inasmuch as the prohibition indicated by the section was intended to be reciprocal prohibition and did not extend as regards the Dominion to indirect taxation. The Supreme Court of Canada, by majority judgment, upheld the decision of the Exchequer Court of Canada, which had held that the import by the Province was liable to pay import duty to the Dominion. Thus the contention raised on behalf of the Dominion was accepted that customs duties were not taxes imposed on property as such but were levied on the importation of certain goods into Canada as a condition of their importation.

This decision of the Supreme Court was challenged before the Privy Council, by Special Leave. The judgment of the Privy Council is reported in *Attorney-General of British Columbia v. Attorney-General of Canada*¹. The Privy Council upheld the decision appealed from and held that import duties imposed by the Dominion upon alcoholic liquors imported into Canada by the Government of British Columbia for the purposes of trade was valid. The Privy Council based its decision on a consideration of the whole scheme of the Canadian Constitution under which the Dominion had the power to regulate trade and commerce throughout the Dominion, and held that :

"section 125 must.....therefore be so considered as to prevent the paramount purpose thus declared being defeated".

The Privy Council further observed that :

"the true solution is to be found in the adaptation of section 125 to the whole scheme of Government which the statute defines".

The *ratio decidendi* in the case just mentioned fully supports the contention raised on behalf of the Union in the present case and the interpretation of Article 289 (1) must also be adapted to the whole scheme of the Constitution.

Turning now to the Constitution of Australia and the relevant cases decided by the High Court of Australia, it is necessary to set out the relevant part of section 51 of the Commonwealth of Australia Constitution Act, 1900 (63 and 64 Vict. c. 12) :

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good Government of Commonwealth with respect to—

(i) Trade and Commerce with other countries and among the States ;

(ii) Taxation ; but so as not to discriminate between the States or parts of States".

This closely follows that part of section 91 of the British North America Act, which has vested the Federal Parliament with the exclusive power to legislate in respect of such trade and commerce and taxation in respect thereof. Section 114 of the Commonwealth of Australia Constitution grants immunity from taxation in the following terms :—

"A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military Force, or impose any tax on property of any kind belonging to the Commonwealth nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

This corresponds to the provisions of section 125 of the Canadian Constitution and Articles 285 and 289 of our Constitution, which have laid down the provisions as to exemption from taxation.

The question of the interpretation of those provisions of the Australian Constitution came before the High Court of Australia in the case of *The Attorney-General of New South Wales v. The Collector of Customs for New South Wales*². In this case

an action was brought by the State of New South Wales to recover the amount of customs duties realised by the Collector of Customs in respect of certain steel rails imported by the plaintiff from England for use in the construction of the railways of the State. The State claimed that those rails were not liable to customs duties on the ground that they were the property of the Government and as such exempt from customs duties by virtue of section 114 of the Constitution. The majority of the Court decided that the imposition of customs duties being a mode of regulating trade and commerce with other countries as well as of exercising the taxing power, the goods imported by a State Government were subject to the customs laws of the Commonwealth. They also laid it down that the levying of the duties of customs is not an imposition of a tax on property within the meaning of section 114 aforesaid. The Court added that even if the words of the section were capable of bearing that comprehensive meaning, that was not the only or necessary meaning and should be rejected as inconsistent with the provisions of the Constitution conferring upon the Commonwealth exclusive power to impose duties of customs and to regulate trade and commerce. Isaacs, J., came to the same conclusion though on somewhat different grounds. In the result, the Court unanimously held, though not for the same reasons, that the goods imported by the State were liable to import duty. The High Court held that the words "impose any tax" might be capable of application to duties of customs. But it pointed out that the levying of customs duties was not within the comprehension of the expression "imposition of a tax on property." It also pointed out that customs duties were imposed in respect of goods and in a sense "upon" goods, even as the expression Stamp Duties, Succession Duties and other forms of indirect taxes are said to be taxes on deeds and other real or personal property. The Court recognised the legal position that customs duties are not really taxation upon property but upon operations or movements of property.

These authorities based on the interpretation of analogous provisions in the Canadian and Australian Constitutions fully support the contention raised on behalf of the Union that customs duties are not taxes on property but are imposts by way of conditions or restrictions on the import and export of goods, in exercise of the Union's exclusive power of regulation of trade and commerce read along with the power of taxation and that the general words of the exemption have to be limited in their scope so as not to come into conflict with the power of the Union to regulate trade and commerce and to impose duties of customs.

It is next urged on behalf of the States that even if Article 289 (1) only exempts the property of the States from tax directly on property, the levy of excise on goods under Item 84 of List I is a tax on property and therefore no excise can be levied on goods belonging to States and manufactured by them. It is further urged that duties of customs including export duties under Item 83 of List I are equally duties on the goods imported or exported and therefore the property of the State must be exempt under Article 289 (1) both from excise duties and from duties of customs including export duties. This raises the question of the nature of duties of excise and customs. This question with respect to excise duties was considered by this Court in the case of *Amalgamated Coalfields Ltd. v. Union of India*¹. After considering the previous decisions of the Federal Court *In re, The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act*²; *The Province of Madras v. M/s. Boddu Paidanna*³ and of the Judicial Committee of the Privy Council in *Governor-General in Council v. Province of Madras*⁴, this Court observed as follows at page 1287 :

"With great respect, we accept the principles laid down by the said three decisions in the matter of levy of an excise duty and the machinery for collection thereof. Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost. The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience."

1. A.I.R. 1962 S.C. 1281 (1287).

2. (1939) F.C.R. 18; (1939) 1 M.L.J. (Sup.) 1.

3. (1942) F.C.R. 90; (1942) 2 M.L.J. 327.

4. (1945) F.C.R. 179; L.R. 72 I.A. 91 :

(1945) 1 M.L.J. 225.

This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture thereof. We may in this connection contrast sales tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and sales tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production, while in the other it is on the act of sale. In neither case, therefore, can it be said that the excise duty or sales tax is a tax directly on the goods, for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income.

Similarly in the case of duties of customs including export duties, though they are levied with reference to goods, the taxable event is either the import of goods within the customs barriers or their export outside the customs barriers. They are also indirect taxes like excise, and cannot, in our opinion, be equated with direct taxes on goods themselves. Now, what is the true nature of an import or export duty? Truly speaking, the imposition of an import duty, by and large, results in a condition which must be fulfilled before the goods can be brought inside the customs barriers, *i.e.*, before they form part of the mass of goods within the country. Such a condition is imposed by way of the exercise of the power of the Union to regulate the manner and terms on which goods may be brought into the country from a foreign land. Similarly an export duty is a condition precedent to sending goods out of the country to other lands. It is not a duty on property in the sense of Article 289 (1). Though the expression "taxation", as defined in Article 366 (28), "includes the imposition of any tax or impost, whether general or local or special", the amplitude of that definition has to be cut down if the context otherwise so requires. The position is that whereas the Union Parliament has been vested with exclusive power to regulate trade and commerce, both foreign and inter-State (Entries 41 and 42) and with the sole responsibility of imposing export and import duties and duties of excise, with a view to regulating trade and commerce and raising revenue, an exception has been engrafted in Article 289 (1) in favour of the States, granting them immunity from certain kinds of Union taxation. It therefore becomes necessary so to construe the provisions of the Constitution as to give full effect to both, as far as may be. If it is held that the States are exempt from all taxation in respect of their exports or imports, it is not difficult to imagine a situation where a State might import or exports all varieties of things and thus nullify to a large extent the exclusive power of Parliament to legislate in respect of those matters. The provisions of Article 289 (1) being in the nature of an exception to the exclusive field of legislation reserved to Parliament, the exception has to be strictly construed, and therefore, limited to taxes on property and on income of a State. In other words, the immunity granted in favour of States has to be restricted to taxes levied directly on property and income. Therefore, even though import and export duty or duties of excise have reference to goods and commodities, they are not taxes on property directly and are not within the exemption in Article 289 (1).

We may in this connection refer to the *Attorney General for British Columbia v. Kingcome Navigation Co., Ltd.*¹, to bring out the essence of duties of customs and excise which were held by the Privy Council to be in their essence trading taxes as distinguished from direct taxes.

But it is contended on behalf of the States that in the scheme of our Constitution no distinction has been made between direct and indirect taxes, and, therefore, this distinction is not relevant to the present controversy. It is true that no such express distinction has been made under our Constitution; even so, taxes in the shape of duties of customs (including export duties) and excise, particularly with a view to regulating trade and commerce in so far as such matters are within the competence of Parliament and are covered by various Entries in List I to which reference has

already been made, cannot be called taxes on property; they are imposts with reference to the movement of property by way of import or export or with reference to production or manufacture of goods. Therefore, even though our Constitution does not make a clear distinction between direct and indirect taxes, there is no doubt that the exemption provided in Article 289 (1) from Union taxation to property must refer to what are known to economists as direct taxes on property and not to indirect taxes like duties of customs and excise which are in their essence trading taxes and not taxes on property.

It is also contended on behalf of the States that the narrower construction suggested on behalf of the Union would very seriously and adversely affect activities of the States. This argument does not take into account the more serious consequences that would follow if the wider interpretation suggested on behalf of the States were to be adopted. For example, a State may decide to embark upon trade and commerce with foreign countries on a large scale in respect of different commodities. On the interpretation put forward by the States, the Union Parliament would be powerless to regulate such trade and commerce by the use of the power of taxation conferred on it by Entry 83 of List I, thus largely nullifying the exclusive power of Parliament to legislate in respect of international trade and commerce, including the power to tax such trade. Trade and commerce with foreign countries, export and import across the customs frontiers and inter-State trade and commerce are all within the exclusive jurisdiction of the Union Parliament. This Court naturally will not adopt a construction of Article 289 (1) which will lead to such a startling result as to nullify the exclusive power of Parliament in these matters.

Lastly, it is urged on behalf of the States that section 20 of the Sea Customs Act was recast and amended by Act XLV of 1951 and that sub-section (2) thereof has borrowed most of its words from the provisions of clause (2) of Article 289, and therefore, Parliament itself had understood clause (2) of Article 289 in the sense in which the States are contending that it should be interpreted. But that, in our opinion, does not conclude the matter, for we have to construe the provisions of the Constitution in their proper setting, and we are entitled to come to the conclusion that Parliament may not have been correct in so interpreting the words of clause (2) of Article 289.

For the reasons given above, it must be held that the immunity granted to the States in respect of Union taxation does not extend to duties of customs including export duties or duties of excise. The answer to the three questions referred to us must, therefore, be in the negative. Let the opinion of this Court be reported to the President accordingly.

S.K. Das, J. (for himself, A.K. Sarkar and K.C. Das Gupta, JJ.)—In exercise of the powers conferred upon him by clause (1) of Article 143 of the Constitution, the President of India has referred three questions of law to this Court for consideration and a report of its opinion thereon. These questions are :

(1) Do the provisions of Article 289 of the Constitution preclude the Union from imposing, or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that Article ?

(2) Do the provisions of Article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that Article ?

(3) Will sub-section (2) of section 20 of the Sea Customs Act, 1878 (Act VIII of 1878) and sub-section (1-A) of section 3 of the Central Excises and Salt Act, 1944 (Act 1 of 1944) as amended by the Bill set out in the Annexure be inconsistent with the provisions of Article 289 of the Constitution of India ?

We have had the advantage of very full arguments on these questions. The learned Solicitor-General of India has put forward the point of view on behalf of the Union of India. Several States were represented before us by their Advocates-General or other counsel. Except for the State of Maharashtra which has taken a stand somewhat akin to that of the Union of India, there is a sharp conflict between the States and the Union as to the answers to be given to the three questions. We

shall presently refer in greater detail to the points of conflict but it may be generally stated that except for the State of Maharashtra, the States have taken the stand that under Article 289 of the Constitution the property of a State is exempt from the imposition of customs duties and excise duties except to the extent permitted under clause (2) of the said Article. The Union of India has taken the stand that the amplitude of power given to the Union Legislature to impose duties of customs (Entry 83 of List I of the Seventh Schedule) and duties of excise (Entry 84 of List I of the Seventh Schedule) can be cut down only by a very strict interpretation of Article 289 and that strict interpretation is that clause (1) of Article 289 is confined to a property tax only, namely, a tax on the goods as such and not on their importation or exportation or on their production and manufacture, and looked at from that point of view Article 289 of the Constitution does not give any protection to a State in the matter of customs duties and excise duties.

It is necessary perhaps to say something at this stage about the constitutional background against which the questions fall for consideration. The Sea Customs Act, 1878 (VIII of 1878) was enacted in March, 1878 in order to consolidate and amend the law relating to the levy of sea customs duties. The Central Excises and Salt Act, 1944 (I of 1944) was enacted in February, 1944 to consolidate and amend the law relating to central duties of excise and to salt. The Government of India Act 1915 (5 and 6 Geo. V, c. 61) was a consolidating measure repealing and re-enacting the numerous Parliamentary Statutes relating to the administration of British India which had been passed between the years 1770 and 1912. This Act was amended in certain minor respects by the Government of India Amendment Act, 1916 (6 and 7 Geo. V, c. 37) which also contained certain substantive provisions not incorporated in the principal Act. In 1919 the Act again underwent amendment by the passing of the Government of India Act, 1919 (9 and 10 Geo. V, c. 101) which was enacted for the purpose of bringing into effect the Indian constitutional reforms based on what is commonly known as the Montagu-Chelmsford Report. Section 45 of the Act of 1919 provided that the amendments made by that Act and the Act of 1916 be incorporated in the text of the Government of India Act, 1915, and that that Act as so amended be known as the Government of India Act. This Government of India Act constituted an Indian Legislature consisting of two Chambers, namely, the Council of States and the Legislative Assembly. This Legislature had the power to make laws for all persons, for all Courts and for all places and things within British India and had also the power to repeal or alter any laws which were in force in any part of British India. Prior to the Government of India Act, 1935 (26 Geo. V, c. 2) the dominion and authority of the Crown, which extended over the whole of British India, was derived from many sources, in part statutory and in part prerogative, the former having their origin in Acts of the British Parliament and the latter in rights based upon conquest, cession or usage some of which were directly acquired while others were enjoyed by the Crown as successor to the rights of the East India Company. The Secretary of State for India was the Crown's responsible agent for the exercise of all authority vested in the Crown in relation to the affairs of India. But the superintendence, direction and control of the civil and military government of India was declared by the Government of India Act to be vested in the Governor-General-in-Council; while the government or administration of the Governors' and Chief Commissioners' Provinces vested respectively in the local governments.

The Government of India Act, 1935 introduced a dual system of government in the shape of autonomous Provinces and a Federation; two sets of Legislatures were set up, one Federal Legislature and the other Provincial Legislature. In the Seventh Schedule were given three Lists, Federal Legislative List called List I, Provincial Legislative List called List II and the Concurrent Legislative List called List III. Legislative power was distributed amongst the Legislatures in accordance with those Lists. Duties of custom, including export duties came within Item 44 of List I and duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors, opium etc., came within Item 45. The Indian Legislature amended the Sea Customs Act, 1878, as also the Central Excises and Salt Act,

1944 from time to time in exercise of the powers which it had either under the Government of India Act, 1919, or the Government of India Act, 1935. The Indian Independence Act, 1947 created the Dominion of India as from 15th August, 1947, and the Secretary of State for India as the Crown's responsible agent for Indian affairs disappeared from the Indian constitutional scene. The Constitution of India came into force on 26th January, 1950. This Constitution envisaged India as a Sovereign Democratic Republic, viz., a Union of States but the scheme of the Government of India Act, 1935 with regard to distribution of legislative powers between Parliament, which is the Union Legislature, and the State Legislatures was continued. The Seventh Schedule of the Constitution contains three lists, Union List called List I, State List called List II, and Concurrent List called List III. Entry 83 of List I relates to duties of customs including export duties and Entry 84 relates to duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors, opium etc. The distribution of legislative powers and the legislative relations between the Union and the States are controlled by various Articles, namely, Articles 245 to 258, in Chapter I of Part XI of the Constitution. We may indicate here briefly the constitutional position that in normal circumstances Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I and the Legislature of any State has exclusive power to make laws for any such State with respect to any of the matters enumerated in List II; both Parliament and the Legislature of a State have power to make laws with respect to any of the matters enumerated in List III.

Under Article 245 of the Constitution, the power of Parliament as also of the Legislature of a State to make laws is subject to the provisions of the Constitution. Some of these provisions are contained in Article 285 and Article 289 which occur in Chapter I, of Part XII of the Constitution. This Part deals with several subjects, such as Finance (Chapter I), Borrowing (Chapter II) and Property, Contracts *etc.* (Chapter III). We may now read Article 289 :

"289 (1).—The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government."

The interpretation of this Article is the main subject for consideration in this Reference.

Soon after the coming into force of the Constitution, section 20 of the Sea Customs Act, 1878 which stated what goods would be dutiable under the Act, was amended by the Union Legislature by Act XLV of 1951. The amendment took the shape of inserting a sub-section in section 20, sub-section (2), which said that the provisions of sub-section (1) shall apply in respect of goods belonging to the Government of a State and used for the purpose of a trade or business of any kind carried on by, or on behalf of, that Government or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government. A similar amendment was made in section 3 of the Central Excises and Salt Act, 1944 by inserting sub-section (1-A) in that section. That sub-section said that the provisions of sub-section (1) shall apply to all excisable goods other than salt which are produced or manufactured in India by, or on behalf of a Government of a State (other than a Union territory) and used for the purposes of a trade or business of any kind carried on by or on behalf of that Government, or of any operations connected with such trade or business as they apply in respect of goods which are not produced or manufactured by any Government. It is obvious that these two amendments were intended to bring the Sea Customs Act, 1878 and the Central Excises and Salt Act, 1944 into harmony with Article 289 of the Constitution. In 1962 the Union Government introduced a Draft Bill in Parliament further to amend the Sea Customs Act, 1878

and the Central Excises and Salt Act, 1944. We may quote two clauses of this Draft Bill in order to appreciate how this Reference has come to be made to this Court. These two clauses are clauses 2 and 3 of the Draft Bill which run :

2. *Amendment of section 20 (Act VIII 1 of 1878).*—In section 20 of the Sea Customs Act, 1878, for sub-section (2) the following sub-section shall be substituted, namely :—

“(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government as they apply in respect of goods not belonging to the Government.”

3. *Amendment of section 3 (Act of 1944).*—In section 3 of the Central Excises and Salt Act, 1944, for sub-section (1-A) the following sub-section shall be substituted, namely :—

“(1-A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government as they apply in respect of goods which are not produced or manufactured by the Government.”

This Draft Bill gave rise to a controversy and the Governments of certain States expressed the view that the amendments proposed in the Draft Bill would not be constitutionally valid as the provisions of Article 289 read with the definitions of ‘taxation’ and ‘tax’ in clause (28) of Article 366 of the Constitution preclude the Union from imposing or authorising the imposition of any tax, including customs duties and excise duties, on or in relation to any property of a State, except to the extent permitted by clause (2) read with clause (3) of the said Article 289. The Union Government was, however, of the view that the exemption from Union taxation granted by clause (1) of Article 289 was restricted to Union taxes *on* the property of a State and did not extend to Union taxes *in relation to* the property of a State ; therefore, customs duties being taxes on the import or export of goods and not on goods as such and excise duties being taxes on the production or manufacture of goods and not on goods as such did not come within the protection of clause (1) of Article 289. This conflict of views gave rise to doubts as to the true interpretation and scope of Article 289 of the Constitution and in particular, as to the constitutional validity of the amendments proposed in the Draft Bill. This led the President to refer the three questions stated above to this Court for consideration and a report of its opinion thereon.

In one of the very earliest References made to the Federal Court (*In re, The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* (*Central Provinces and Berar Act No. XIV of 1938*) under section 213 of the Government of India Act, 1935 (which corresponded to Article 143 of the Constitution), Gwyer, C.J., observed that the rules which would apply to the interpretation of other statutes would apply equally to the interpretation of a constitutional enactment, but their application must be conditioned of necessity by the subject matter of the enactment itself, namely, the nature and scope of the Act itself which is a Constitution, “a mechanism under which laws are to be made and not a mere Act which declares what the law ought to be.” He said that this was especially true of a Federal Constitution, with its nice balance of jurisdictions. We recognise that a broad and liberal spirit must inspire those whose duty it is to interpret an organic instrument which sets up a constitutional machinery, a machinery meant to control the life of a nation, to embody its ideals, and facilitate the realisation of such ideals for the present and the future ; this does not however imply that those whose duty it is to interpret the Constitution are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory or even for the purpose of supplying omissions or of correcting supposed errors.

Keeping these principles in mind let us consider the problem before us by an examination of the relevant Articles of the Constitution bearing on that problem. The crux of the problem is the true scope and effect of Article 289 of the Constitution which we have quoted earlier. Clause (1) of Article 289 states that the property and income of a State shall be exempt from Union taxation. Now, Article 366 (28) says in clear terms that, unless the context otherwise requires, the expression “taxation” includes the imposition of any tax or impost whether general or local or special and the word “tax” shall be construed accordingly. We shall presently consider the

question whether the context of Article 289 requires a different meaning to be given to the word "taxation". But let us first see what happens if we read Article 289 (1) by substituting for the expression "taxation" the words which Article 366 (28) says the expression "taxation" includes. Clause (1) of Article 289 will then read as follows :

"The property and income of a State shall be exempt from the imposition of any tax or impost, whether general or local or special by the Union".

There can be no manner of doubt that customs duty or excise duty is an impost within the meaning of Article 366 (28), and this the learned Solicitor-General has not contested. If therefore Article 289 (1) is interpreted with the key furnished by Article 366 (28), then it seems to us that however broad and liberal a spirit may inspire those whose duty it is to interpret the Article, it would be impossible to stretch or pervert the language of the Article which in the clearest of terms says that the property and income of a State shall be exempt from any impost, whether general or local or special, by the Union.

So far as the property of the Union is concerned the counterpart of Article 289 is Article 285 which reads :

"(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any Authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any Authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

Now, the words of Article 285 (1) are still more clear and emphatic. It says that the property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any Authority within a State. The expression "all taxes" must mean all taxes whether they be on property or in relation to property. Neither in Article 289 (1) nor in Article 285 (1) do we see any restricting words which would cut down the full meaning of the expression "taxation" in Article 289 or "all taxes" in Article 285. The distribution of legislative power under Article 245 is in express terms subject to the provisions of the Constitution. The result therefore is that Parliament cannot legislate to take away the exemption given by Article 289 (1), nor can a State Legislature legislate to take away the exemption given by Article 285 (1). If one follows the principles of interpretation to which we have earlier referred, the plain effect of Articles 245, 285 (1), 289 (1) and 366 (28) appears to be this : under Article 285 (1) the property of the Union shall be exempt from all taxes imposed by the State or by any Authority within a State, save in so far as Parliament may by law otherwise provide; the property and income of a State shall be exempt from Union taxation save in so far as clause (2) of Article 289 allows or authorises the imposition of any tax on the property of a State.

Let us now consider whether the context of Article 289 or any of the other Articles in the Constitution requires that a different meaning should be given to the expression "taxation" or "taxes" in Article 289 (1) or Article 285 (1).

The learned Solicitor-General has emphasised the use of the words 'property' and 'income' in Article 289 and has further submitted that the word 'income' was not necessary in Article 285 (1) and has not been mentioned there, because "taxes on income other than agricultural income" is an Item in List I of the Seventh Schedule of the Constitution and a State, or an Authority within a State, has no legislative competence to impose a tax on income. From the use of the two words 'property' and 'income' in clause (1) of Article 289, the learned Solicitor-General has argued that the intention of the makers of the Constitution must have been to restrict clause (1) to a direct tax on property or income that is, a tax on property as such or a tax on income as such. He has elaborated this argument in this way : as 'income shall be exempt from tax' means that income shall be exempt from income-tax, in the same way the expression 'property shall be exempt from tax' means that property shall be exempt from property tax. In other words, he contends, that the word 'property' must control the word 'taxation' and must be interpreted as modifying the comprehensive connotation of the word 'taxation'.

We are wholly unable to accept this line of argument as correct. The learned Solicitor-General has indeed conceded that the word 'property' in clause (1) of Article 289 has a comprehensive connotation and refers to all property and assets of a State. Article 294 which occurs in the same Part of the Constitution states that as from the commencement of the Constitution all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State. It is clear therefore that in the Constitution the word 'property' is used in a comprehensive sense to include all assets, movable or immovable. Apart from those assets which vested in the Union or a State at the commencement of the Constitution, the Union or a State may acquire new assets. This is also provided for in Articles 296 to 298 of the Constitution. Therefore, in both Articles 285 and 289 the word 'property' means all property and assets which vested in the Union or a State at the commencement of the Constitution and all property and assets which may thereafter be acquired by the Union or a State. In clause (1) of Article 289 the subject of the sentence is 'property and income' and the predicate is 'shall be exempt from Union taxation'. Grammatically, the clause can only mean this : all property and income of a State shall be exempt from all taxation by the Union, giving the word 'taxation' its comprehensive meaning, as required by Article 366 (28). It is necessary to emphasise here that the word 'property' used in the sentence is not used as a word qualifying the word 'taxation'; rather it is used as a subject which gets the benefit of exemption from Union taxation. One can understand that when one says that State income shall be free from Union tax he means that such income shall be free from Union income tax, particularly when there is only one legislative Item with regard to a tax on income (other than agricultural income) which is Entry 82 in List I. But we fail to appreciate how the word 'property' can be used as qualifying the word 'taxation' and thereby restricting the ambit of its comprehensive connotation. The Union power of taxation on or in relation to property of various kinds ranges over a wide field; see Entries 82 to 92-A of the Constitution. Why then should the use of the word 'property' in Articles 285 and 289 refer only to those items which enable the imposition of a direct tax on property and not to others? We find no legitimate ground for such restriction in the context of Article 289. Such a restriction would, in our opinion, be clearly against the plain language of the Article.

The learned Solicitor-General has conceded that Articles 285 (1) and 289 (1) are analogous and complementary Articles and bear the same meaning. In Article 285 (1) the word 'income' does not occur, but the word property occurs. It states that the property of the Union shall be exempt from all taxes imposed by a State etc. We fail to see how in Article 285 (1) the word 'property' can be taken to qualify and cut down the expression "all taxes" occurring therein. It should be obvious that the expression 'all taxes' means all taxes, and the clear intention as expressed in Article 285 (1) is that the property of the Union shall be exempt from all taxes imposed by a State or by any authority within a State, including even a tax on agricultural income derived from Union property. It is worthy of note here that the Items in List II which deal with taxes or duties which can be imposed by a State Legislature are those contained in Items 46 to 62 thereof. Some of these Items are indeed taxes on property as such, e.g., Item 49, "taxes on lands and buildings"; Item 56, "taxes on goods and passengers carried by road or on inland waterways"; Item 57, "taxes on vehicles, whether mechanically propelled or not, suitable for use on roads etc."; and Item 58, "taxes on animals and boats". Some other items are in relation to property, but are not on property as such; e.g., Item 51, "duties of excise on the manufacture or production of alcoholic liquors for human consumption manufactured in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India"; Item 52, "taxes on the entry of goods into a local area for consumption, use or sale therein"; and Item 54, "taxes on the sale or purchase of goods other than newspapers"; and Item 55, "taxes on advertisement other than advertisements published in the newspapers".

If the argument of the learned Solicitor-General is correct, then the property of the Union will be exempt from such taxes imposed by a State, or by an authority within a State, as are property taxes, that is, taxes on property as such, but not exempt from taxes which are on the manufacture or production of goods, entry of goods sale or purchase of goods etc. This would mean that the expression 'all taxes' occurring in Article 285 (1) would lose its meaning, and we must read the Article as though when the Constitution-makers used the expression 'all taxes', they meant some taxes only and not all taxes. It is to be noticed that under Article 366 (28) the word 'tax' has also to be construed in the same comprehensive way as the word 'taxation'. It is necessary to state here that fortunately for us, neither under the Government of India Act, 1935 nor under our present Constitution, is it necessary to examine the niceties of distinction between direct and indirect taxation, as no such division exists in the Government of India Act, 1935 or in the Constitution. There are several taxes like taxes on luxuries or trade which can be indirect; and some taxes like succession duties (and even excise) have in part been assigned to both.

In *M. P. V. Sundaramier & Co. v. The State of Andhra Pradesh*¹, this Court observed that our Constitution was not written on a *tabula rasa*: and that a Federal Constitution had been established under the Government of India Act, 1935, and though that has undergone considerable change by way of repeal, modification and addition, it still remains the framework on which the present Constitution is built. On an analysis of the subjects in List I and List II of the Seventh Schedule of the Constitution, this Court observed:

"The above analysis—and it is not exhaustive of the Entries in the Lists—leads to the inference that taxation is not intended to be comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence. And this distinction is also manifest in the language of Article 248, clauses (1) and (2), and of Entry 97 in List I of the Constitution."

The distinction is between the main subject of legislation and a tax in relation thereto; the main subject of legislation figures in one group and a tax in relation thereto is separately mentioned in a second group, but no distinction is drawn between direct and indirect taxation. There are several taxing items in List I and List II which will take in both direct and indirect taxation. In *re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938* (Central Provinces and Berar Act No. XIV of 1938)², Sulaiman, J., after referring to the Canadian Constitution as embodied in the British North America Act, 1867 and the Australian Constitution as embodied in the Commonwealth of Australia Constitution Act, 1900 observed that unlike those Constitutions the Government of India Act, 1935 did not make any distinction between direct and indirect taxation and in the matter of legislative competence the ultimate incidence of the tax was not necessarily a crucial test and there was no justification for adopting any such principle as that certain classes of duties which were to be regarded as direct had been assigned to the Provinces, and other classes regarded as indirect had been reserved for the Federation (see the observations at page 73). As in the Government of India Act, 1935, so also in our Constitution the distinction for purposes of legislative competence is between the main subject of legislation and a tax in relation thereto.

If this be the correct position, then it is impossible to accept the argument advanced on behalf of the Union that the word 'property' in clause (1) of Article 289 or clause (1) of Article 285 makes a distinction between direct and indirect taxation, namely, a tax on property as such and a tax in relation to property.

If we examine clauses (2) and (3) of Article 289 and clause (2) of Article 285, the position becomes still more clear. It seems clear to us that clause (2) of Article 289 carves out an exception to clause (1) in the sense that it states that nothing in clause (1) shall prevent the Union from imposing or authorising the imposition of any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on, by or on behalf of, a Government of a State, or any operations connected therewith, or any property used or occupied for the purposes

1. (1958) S.C.R. 1422; (1958) S.C.J. 459; 2. 1939 F.C.R. 18 (73); (1939) 1 M.L.J. (1958) 1 M.L.J. (S.C.) 179; (1958) 1 AnW.R. (Supp.) 1 (F.C.). (S.C.) 179.

of such trade or business, or any income accruing or arising in connection therewith. Clause (3) says that nothing in clause (2) shall apply to any trade or business or to any class of trade or business which Parliament may by law declare to be incidental to the ordinary functions of Government. Clause (2) creates an exception to clause (1) and clause (3) creates an exception upon an exception. The broad distinction drawn in these two clauses is between trading or business activities of the Government of a State and its governmental functions. In respect to its trading or business activities a tax may be imposed and if any property is used or occupied for the purpose of trade or business it is liable to tax. If however the trade or business is declared by Parliament to be incidental to the ordinary functions of a Government, the exemption given by clause (1) will operate and clause (2) will not defeat that operation. The combined effect of clauses (1), (2) and (3) appears to be this : under clause (1) the property and income of a State is exempt from Union taxation ; clause (2) however says that the income of a State derived from commercial activities or the property of a State in respect of a trade or business of any kind carried on by or on behalf of a Government of a State or any operations connected therewith or any property used or occupied for the purpose of such trade or business shall not be immune from Union taxation ; under clause (3) however Parliament may by law declare, any trade or business or any class of trade or business of a State to be incidental to the ordinary functions of Government and if Parliament so declares clause (2) will not apply and the operation of clause (1) will not be arrested. What is a governmental function or what is a trading or business function is not always easy to determine. Thus in Australia, activities of the Government have been held to be 'industrial' even though nothing is charged for services, e.g. municipal road construction, harbour dredging, piloting and ferries. Our Constitution avoids this difficulty by empowering Parliament to declare by law that any trade or business carried on by a State shall not come within the scope of clause (2) of the Article but shall be deemed to be 'incidental to the ordinary functions of government'. Upon such declaration no taxation by the Union of such trade or business or property or income connected therewith will be possible. This seems to us to be the true effect of the three clauses of Article 289.

If clause (1) of Article 289 has a restricted meaning as is contended for by the learned Solicitor-General on behalf of the Union, then the distinction drawn between trading or business activities on one hand and governmental functions on the other in clause (2) and clause (3) of Article 289 loses its full significance ; for clauses (1) and (2) distinguish between trading and other functions and clauses (2) and (3) distinguish between ordinary trading and trading which is really governmental function. What all that the Union is prevented from doing is to put a tax on property as such, what was the purpose of drawing a distinction between the trading or business activities of Government and its governmental functions ? If the tax is to be levied on property as such, then obviously there cannot be any impost on a trading or business activity, as for example, on the production or manufacture of goods etc. Why was it necessary then to make a reference to trading or business activities or operations in clauses (2) and (3) of Article 289 ? It would have been enough merely to say that property used or occupied in connection with a trade or business will be liable to a tax, but not other property. But the ambit of clause (2) is much wider than the mere use or occupation of property in connection with trade or business. It is a reference to trading or business activities, such as, the production and manufacture of goods, transportation of goods etc. Why was it necessary for the constitution-makers to refer to such trading or business activities in clause (2) if what they had in mind in clause (1) was a direct tax on property ? In our opinion, the learned Solicitor-General has given no satisfactory explanation with regard to this aspect of the case. He suggested at first that clause (2) was not an exception, but merely explanatory of clause (1). It is difficult to understand why there should be a reference to business or trading activities in clause (2) if the entire intentment was to confine the exemption to a direct tax on property. The learned Solicitor-General then said that even if clause (2) was an exception, it was an exception only in the matter of property tax. That would mean that only the last portion of clause

(2) which refers to property used or occupied for the purpose of trading or business activities of a State Government has any significance and not the other parts which relate to trading or business activities, such as, production or manufacture of goods, etc.

We have noticed earlier that the amendments which Parliament itself made in 1951 in section 20 of the Sea Customs Act, 1878 and section 3 of the Central Excises and Salt Act, 1944 by inserting two sub-sections thereto showed that Parliament understood clause (2) of Article 289 as creating an exception to clause (1). Those two amendments, sub-section (2) of section 20 of the Sea Customs Act, 1878 and sub-section (1-A) of section 3 of the Central Excises and Salt Act, 1944, draw a distinction between the trading activities of the Government of a State and its governmental functions; no exemption is given in respect of goods belonging to a State Government and used for the purpose of a trade or business of any kind carried on by or on behalf of that Government or of any operations connected with such trade or business, but exemption is granted in respect of other goods belonging to Government.

If, therefore, we look to the context of Article 289, particularly clauses (2) and (3) thereof, it becomes manifest that there is nothing in Article 289 which restricts the comprehensive meaning to be given to the word 'taxation' in Article 289. Similar is the position with regard to clause (2) of Article 285. That again creates an exception to clause (1) of Article 285 and saves any tax on any property of the Union to which such property was immediately before the commencement of the Constitution liable or treated as liable to tax, so long as that tax continues to be levied in that State.

One very serious objection to the contention of the learned Solicitor-General, an objection which appears to us to be almost fatal, is that in the taxing Entries in List I (from Entry 82 to Entry 92-A) there is no entry which would enable the Union to impose a tax on property as such, that is, a direct tax on property as property, in the sense suggested by the learned Solicitor-General for his interpretation of Article 289 (1). There are, however, Entries, in List II to some of which we have referred earlier, which would enable the State Legislature to impose a direct tax on property, such as, 'lands and buildings' and animals and boats' etc. If the learned Solicitor-General is right in his contention, then the only tax from which the property of a State can claim exemption under clause (1) of Article 289 is 'property tax' to be imposed by the Union, and yet under the Legislative Entries in List I the Union cannot impose a 'property tax' on State property at all. To this aspect of the case the reply of the learned Solicitor-General has been two-fold; he has first referred us to Entry 89 (terminal taxes on goods and passengers carried by railway, sea or air), Entry 86 (taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies) and Entry 97, the residuary entry; secondly, he has referred us to Article 246 (4) under which Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. His argument is that the Union can impose a property tax under any of the aforesaid three entries; secondly, under Article 246 (4) the Union can impose a property tax on State property if that property is situate in a territory not included in a State. It appears to us that the argument does not really meet the objection raised on behalf of the States. Entry 86 relates to capital value of the assets of individuals and companies and has nothing to do with State property, for the State is neither an individual nor a company. Entry 89 relates to a terminal tax which is essentially different from a property tax in the sense contended for by the learned Solicitor-General. We find it difficult to believe that the exemption given by clause (1) of Article 289 was meant as a safeguard against the exercise of power under the residuary entry. Apart from that, we have considerable doubt if the residuary Entry will take in a 'property tax' when there are Entries relating to such tax in List II. It would be a case of much ado about nothing if the Constitution solemnly provided for an exemption against 'property tax' on State property only for such rare cases as are contemplated in Article 246 (4), the situation of State property in

territory not included in a State. Such situation would be very rare, and could have hardly necessitated a solemn safeguard at the inception of the Constitution when the States were classed under Part A or Part B of the First Schedule. If the wider interpretation of clause (1) of Article 289 is accepted, such property would also be exempt from Union taxation except in cases covered by clause (2) of the Article. We find it difficult to accept the contention that clause (1) of Article 289 was meant only for cases covered by Article 246 (4) ; for that would be the result of the interpretation canvassed for on behalf of the Union.

We proceed now to consider the problem from three other aspects : (1) against the background of similar provisions in the Government of India Act, 1935 ; (2) in the light of the scheme under the Constitution of the financial relations between the States and the Union ; and (3) the distribution of taxing powers between the States and the Union.

As to the Government of India Act, 1935, the relevant provisions are contained in sections 154 and 155. They read as follows (so far as relevant for our purpose) :

" Section 154.—Property vested in His Majesty for purposes of the Government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any authority within, a Province or Federated State :

Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto.

Section 155.—(1) Subject as hereinafter provided, the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situated in British India or income accruing, arising or received in British India :

Provided that—

(a) where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof ;

(b) * * * * *

(2) * * * * *

Before the Government of India Act, 1935 the scheme of government was essentially unitary though there were Local Legislatures with limited powers. For the purpose of distinguishing the functions of the local governments and Local Legislatures of Governors' Provinces from the functions of the Governor-General in Council and the Indian Legislature, subjects were classified in relation to the functions of Government as Central and Provincial subjects in accordance with the Lists set out in Schedule I of the Devolution Rules made under sections 45-A and 129-A of the Government of India Act, 1919. All Government property then vested in His Majesty for the purpose of the Government of India and there was no necessity for any special provision granting immunity to that property from taxation. The Government of India Act, 1935, introduced a dual system of Government. Part III of the Government of India Act, 1935, came into force on 1st April, 1937. Properties belonging to the Crown and in existence prior to that date were governed by the general law enunciated by the Courts. Judicial opinion was however not uniform. In some cases it was held that Statutes imposing duties of taxes bind Government unless the very nature of the duty or tax is such as to be inapplicable to Government. On the other hand, in some cases it was held that the law was the same in India as in England, where the principle of immunity of Crown property from taxation followed from the prerogative that the Crown was not bound by any Statute unless expressly named. When the dual system of Government was first introduced by the Government of India Act, 1935, the question of immunity of taxation of property of one Government by the other arose.

The doctrine of Immunity of Instrumentalities was propounded by the Supreme Court of the United States in the case of *McCulloch v. Maryland*¹, to mean that

when two separate Governments are established as in a Federal Constitution, each with a limited jurisdiction, the power of each Government shall be construed as being under an implied limitation that it shall be so exercised as not to impair the functions allotted to the other Government. Hence, any incidental or indirect interference with the functions of the Federal Government would make a State legislation bad even though the legislation might relate to a subject allotted to the State Legislature and conversely. It was held that a State could not tax the agencies or instrumentalities of the Federal Government and a similar limitation would apply as regards the Federal Legislature. This doctrine has had many vicissitudes of fortune in the decisions of the Courts in America. We do not think that it is necessary to deal with the history of those vicissitudes.

The Government of India Act, 1935, as also the Constitution of 1950 contained provisions which accepted the principle with a limited application as regards the exemption from mutual taxation, in sections 154 and 155 of the Act of 1935 and Articles 285 and 289 of the Constitution. In the words of the Judicial Committee in *Webb v. Outrim*², it may be stated that the very inclusion of the aforesaid provisions shows that the question of interference on the part of the Federal and State powers as against each other was not left to an 'implied prohibition or limitation' but the provisions themselves define the extent of the immunity. Outside those provisions the State and Union Legislatures have the full power to legislate on the matters included within their respective Lists, subject always to the other provisions of the Constitution.

Like Articles 285 and 289 of the Constitution, the aforesaid sections 154 and 155 are complementary to each other and provide for the mutual exemption of the property of the Federation and the Provinces from taxation imposed by the other: this is consistent with the general practice of Federal Constitutions to exempt the governments of the units from Federal taxation, that being part of a reciprocal arrangement under which the Federal Government also is exempt from taxation by the several units (see Parliamentary Debates, Vol. 302, Col. 523 and 524). One noticeable feature of the two sections is that whereas section 154 speaks of the "property vested in His Majesty for the purpose of the Federation" so as to include movable property also (see *Bell v. Municipal Commissioner of Madras*¹, section 155 which confers exemption on the property of the "units" is confined to lands and buildings. The result would be that movable property belonging to the Federation would be exempt from duties like octroi which might be levied under the Provincial law, while goods of the Provincial Governments and "units" would be subject to the customs and excise duties levied by the Federal Government. Income from commercial undertakings and operations in the nature of trade carried on by the units, so long as they are confined within the territory of that unit is not liable to Federal income-tax. This in short, was the scheme of sections 154 and 155 of the Government of India Act, 1935. Now, if sections 154 and 155 of the Government of India Act, 1935, are contrasted with Articles 285 and 289 of the Constitution, one noticeable difference strikes one at once. The expression 'lands and buildings' in section 155 is changed to 'property' in Article 289; in other words, the Union and the States are practically put on the same footing so far as exemption from taxation of one by the other is concerned. Both Articles 285 and 289 mention 'property' in a comprehensive sense, and the distinction between movable property and immovable property drawn in sections 154 and 155 is done away with. The inevitable conclusion is that the Constitution-makers consciously made the departure. They must have been aware of the distinction made in sections 154 and 155 and also of the interpretation of Courts that 'property' in section 154 was used in a comprehensive sense so as to get exemption for the property of the Federation from all Provincial taxation. With that knowledge they used the word 'property' in Article 289 and put State 'property' on a par with Union 'property'. It is impossible to accept in these circumstances the contention that the word 'property,' or the juxtaposition of the words 'property and income' in Article 289 was intend-

ed to qualify the word 'taxation' and thereby the plain meaning of the language used.

Now, as to the financial relations between the Union and the States. Chapter I of Part XII contains provisions which control and govern these relations. Put briefly, the scheme is that there is a distribution of revenues between the Union and the States, even though the collection may be made in some cases by the States and in other cases by the Union; some taxes collected by the Union are assigned to the States (Article 269); some taxes levied and collected by the Union are distributed between the Union and the States (Articles 270 and 272); there are provisions for grants in aid of the revenues of some States, in which jute is extensively grown, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products (Article 273); there are also provisions for grants in aid of the revenues of such States as Parliament may determine to be in need of assistance (Article 275), etc. These provisions indicate clearly that there is an attempt at adjustment on a financial integration so that neither the Union nor the States may be starved for want of financial resources to carry on the essential and expending activities of a welfare State. We do not see in these provisions any determining consideration which would bear upon the exemption granted to Union property by Article 285 and that granted to State property by Article 289. We fail to see how a restricted meaning given to the aforesaid two articles will facilitate the financial adjustment referred to in the earlier Articles in the same chapter or how it will retard the said adjustment if a wider meaning is given to them. We repeat that Articles 285 and 289 must be construed on their own terms, and it is not open to us to pervert or change the language used therein unless there are compelling reasons to be gathered from other relevant Articles of the Constitution. We find no such compelling reasons in the other Articles of Part XII which deal with the financial relations between the States and the Union.

We have earlier referred briefly to the distribution of legislative power between the States and the Union. We have also pointed out that so far as the taxing powers are concerned, the Legislative Entries in the Seventh Schedule make a distinction, for purposes of legislative competence, between the main subject of legislation and a tax in relation thereto. Taxes on income other than agricultural income (Entry 82), duties of customs including export duties (Entry 83), and duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption, opium, hemp and other narcotic drugs (Entry 84) are in List I. Therefore, under Article 246 Parliament alone has power to make laws imposing the aforesaid taxes. This power, it has been argued on behalf of the Union, will be seriously curtailed if a wider meaning is given to Article 289. We do not think that this argument is any answer to the problem posed before us. The power to make laws given to Parliament is subject to the provisions of the Constitution. Article 289 is one of such provisions. Therefore, it is no answer to the problem to say that if a wider meaning is given to Article 289, it will curtail the powers of Parliament. If Article 289 in its true scope and effect is capable of bearing only the wider meaning, then it must control the power of Parliament. Article 245 says so in express terms.

Another argument on this aspect of the case is that the Union has exclusive power to regulate trade and commerce with foreign countries, import and export across customs frontiers, and definition of customs frontiers (Entry 41 of List I) and inter-State trade and commerce (Entry 42 of the same List), and the power to regulate trade and commerce with foreign countries or inter-State trade includes the power to regulate by imposing customs duties or duties of excise. This power, it is contended, will be very seriously affected if the exemption from taxation given by Article 289 is held to extend to customs duties and excise duties in respect of goods imported or exported by a State or goods produced or manufactured by a State. We are not impressed by the argument. The power to control trade and commerce with foreign countries and inter-State trade is with the Union and in exercise of that power the Union can impose regulatory measures on the activities of a State. We

are familiar now with control measures like the Import Control Order, Essential Supplies Act, etc. Through these regulatory measures the Union can carry into effect its power of control, and under Article 302 Parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Under Article 256 the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Union Government to be necessary for that purpose. Under Article 257 the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the Union Government can give necessary directions in the matter to the State Government. So far as trade and commerce within the State is concerned, the State has power to make laws (Entry 26 of List II). We think, therefore, that nothing serious is likely to happen, either with regard to foreign trade or inter-State trade, if we hold on the terms of Article 289 that State property is exempt from Union taxation including customs duties or excise duties. Such an interpretation is not likely to result in any interference with the power of control which the Union undoubtedly has over foreign trade or inter-State trade.

The contention that the Union has the power to regulate trade by imposition of customs duties and that power would be annulled if the State has immunity from them in respect of things imported or exported by it seems to us to be fallacious. The Union's power to legislate to regulate foreign trade contained in the Legislative List is subject to the provisions of the Constitution one of which is contained in Article 289 (1). Therefore in the case of a conflict between Article 289 (1) and the legislative power to regulate foreign trade, the former must prevail. The Union therefore cannot in view of Article 289 (1) impose a customs duty on things imported by the State and seek to justify it as an exercise of its power to regulate foreign trade. Then, again it seems to us that as stated in *M.P. V. Sundararamier & Co., case*¹, an item in the Legislative List not giving expressly the power of taxation does not confer such a power. It would follow that the power in List I to regulate foreign trade cannot be exercised by imposition of a tax. That has to be done otherwise and without the imposition of a tax.

It is to be remembered that a striking feature of our Constitution, which perhaps distinguishes it from some other Constitutions, is its attempt to harmonise the interests of the individual with those of the community and the interests of a State with those of the Union. Our Constitution does not set up the States as rivals to one another or to the Union. Each is intended to work harmoniously in its own sphere without impediment by the other, with an overriding power to the Union where it is necessary in the public interest. It is a nice balance of jurisdiction which has worked satisfactorily so far and, it is to be hoped, will continue to so work in times to come with good sense prevailing on all sides. We are not prepared to say that the exemption given to State property from Union taxation by Article 289 conflicts in any way with the power of control which the Union has over foreign trade or inter-State trade or disturbs the balance of jurisdictions referred to above. It is to be remembered in this context that under clause (2) of Article 289 the trading activities of a State and property used for such trading activities cannot claim any exemption from Union taxation, unless Parliament declares by law that the trading activities are incidental to the ordinary functions of government.

We have so far dealt with the problem on the relevant Articles of our Constitution. It may be helpful now to consider how a similar problem under other Federal Constitutions has been dealt with by the Courts.

It is necessary here to strike a note of warning. Each Constitution must be interpreted on its own terms and in its own setting of history, geography, and social conditions of the country and nation for which the Constitution is made ; a decision

1. (1958) S.C.R. 1422 : (1958) S.C.J. 459 : (S.C.) 179.
(1958) 1 M.L.J. (S.C.) 179 : (1958) 1 An. W.R.

on a constitutional problem having an apparent similarity with a problem arising under a different Constitution may not be a sure guide as a solution of the problem. Basically, the problem must be solved on the terms of the Constitution under which it arises. Remembering this warning, we turn first to certain Canadian decisions on which the learned Solicitor-General has relied. The vital core of a Federal Constitution, it is said, is the division of legislative powers between the Central Authority and the component States or Provinces. In sections 91 to 95 of the British North America Act, 1867, the main lines of this division in Canada were set forth. In section 92 certain classes of subjects were enumerated and the Provinces were given exclusive power to make laws in relation to matters coming within these classes of subjects. The opening paragraph of section 91 gave the Dominion power,

“to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces”.

That is to say, the residue of powers not expressly given to the Provinces was reserved to the Dominion. The section then proceeded with a specific enumeration of twenty-nine classes of subjects, illustrating but not restricting the scope of the general words used earlier in the section. Section 125 said,

“No lands or property belonging to Canada or any Province shall be liable to taxation”.

In *The Attorney-General of British Columbia v. The Attorney-General for the Dominion of Canada*¹, the facts were these. The government of the province of British Columbia in the exercise of its powers of control and sale of alcoholic liquors embarked on the business of dealing in alcoholic liquors and found itself under the necessity of importing “Johnnie Walker Black Label” whiskey; it claimed it was exempt from payment of the usual customs duties imposed by the Dominion Parliament and rested its claim on section 125. The Supreme Court of Canada held by a majority decision that the levying of customs duties on the goods in question was not “taxation” on “property” belonging to a Province within the purview of section 125. The ratio of the decision, as expressed by Duff, J., was that customs duties as an instrument for regulation of external trade came within the second enumerated head under section 91; and customs duties when levied for the purpose of raising a revenue were, speaking broadly and in the general view of them, taxes on consumable commodities, taxes on consumption; while the taxation of capital, of assets, of property was a very different matter. Duff, J., then said:

“Our first duty in construing the section is, of course, to ascertain the ordinary and grammatical meaning of the words but it is with the ordinary and grammatical meaning of the words in the setting in which they are found and as applied to the subject-matter that we are concerned. What the section is dealing with is not taxation in general but the liability of “property” to “taxation” and the word taxation when used in this association has, I think, *prima facie* a much less comprehensive import than that which would be ascribed to it standing by itself or in some other connection.”

It is pertinent to note here that the Canadian Constitution did not contain a key to the word “taxation” as is contained in Article 366 (28) of our Constitution. It was permissible, therefore, in the setting of the Canadian Constitution to draw a distinction between “taxation of property” and the “levying of customs duties” for purposes of raising revenue. Our Constitution says in express terms that “taxation” includes the imposition of any tax or impost, whether general, local or special. It is reasonable to think that the makers of our Constitution were aware of the distinction between the more comprehensive and less comprehensive meaning that can be attached to the word “taxation”, and deliberately chose to mention expressly the more comprehensive meaning in the interpretation Articles, instead of leaving it to judicial determination. One may well speculate if the decision in Canada would have been the same if there were such a provision in the Canadian Constitution and if, as Duff, J., said, our first duty in construing a provision is to ascertain the ordinary and grammatical meaning of the words used. The aforesaid decision of the Supreme Court was approved by the Privy Council in *Attorney-General of British Columbia v. Attorney-General of Canada*². Referring to section 125 of the British North America Act, Lord Buckmaster said:

1. 64 Can. S.C.R. 377.

2. L.R. (1924) A.C. 222.

"Taken alone and read without consideration of the scheme of the statute, this section undoubtedly creates a formidable argument in support of the appellant's case. It is plain, however that the section cannot be regarded in this isolated and disjunctive way. It is only a part of the general scheme established by the statute with its different allocations of powers and authorities to the Provincial and Dominion Government. Section 91, which assigns powers to the Dominion provides, among other things, that it shall enjoy exclusive legislative authority over all matters enumerated in the Schedule, included among which are the regulation of trade and commerce and raising of money by any mode or system of taxation. The imposition of customs duties upon goods imported into any country may have many objects; it may be designed to raise revenue or to regulate trade and commerce by protecting native industries, or it may have the two-fold purpose of attempting to secure both ends; in either case it is a power reserved to the Dominion. It has not indeed been denied that such a general power does exist, but it is said that a breach is created in the tariff wall, which the Dominion has the power to erect, by section 125, which enables goods of the Province or the Dominion to pass through, unaffected by the duties. But section 125 cannot, in their Lordships' opinion, be so regarded. It is to be found in a series of sections which, beginning with section 102, distribute as between the Dominion and the Province certain distinct classes of property, and confer control upon the Province with regard to the part allocated to them. But this does not exclude the operation of Dominion laws made in exercise of the authority conferred by section 91. The Dominion have the power to regulate trade and commerce throughout the Dominion, and, to the extent to which this power applies, there is no partiality in its operation. Section 125 must, therefore, be so considered as to prevent the paramount purpose thus declared from being defeated."

It is obvious that the observations made by Lord Buckmaster have reference to the special characteristics of the Canadian Constitution, particularly the paramountcy of Dominion Power to regulate trade and commerce throughout the Dominion to which section 125 was made to yield. The scheme of our Constitution is different: (1) the legislative power of Parliament is expressly subject to other provisions of the Constitution; (2) the power to regulate trade and commerce is assigned both to the Union and the States; and (3) there is a distinction between the main subject of legislation and a tax in relation thereto. We are not emphasising the fact that in section 91 of the British North America Act, 1867, occurs the expression "notwithstanding anything in this Act", because that expression may be said to relate to the enumeration of subjects rather than to section 125. In our view the decision turned upon the peculiar characteristics of the Constitution under which the problem arose and is no safe guide for the interpretation of our Constitution. It may perhaps be added that if the Canadian case fell to be decided under our Constitution, clause (2) of Article 289 would have given an adequate answer to the problem, for a State can claim no exemption in respect of its business activities and when British Columbia imported whiskey to embark on a business of alcoholic liquors, it would not claim any exemption under clause (1) of Article 289.

We now turn to certain Australian decisions. Speaking generally, the Commonwealth of Australia Constitution Act, 1900, creates a Federation which resembles the United States in the manner in which powers are assigned to the Federal Government with a residue in the States or the people. It resembles the Canadian Constitution in the attempt to adapt the machinery of responsible government to a Federal system, but differs from the Canadian and our Constitution in the division of powers. As regards the Commonwealth, section 51 contains a list of thirty-nine enumerated powers with which it is vested. It says *inter alia* that, subject to the Constitution, the Parliament shall have power to make laws for the peace, order and good government of the Commonwealth with respect to—

- (i) Trade and commerce with other countries, and among the States; and
- (ii) Taxation, but so as not to discriminate between the States or parts of States.

Section 52 defines the cases in which the power of the Commonwealth is to be exclusive. As regards the State, the broad principle of the division is found in section 107 which in effect says that the powers of the States are left unaffected by the Constitution except in so far as the contrary is expressly provided; subject to that each State remains sovereign within its own sphere. Now, section 114 of the Commonwealth of Australia Act, 1900, says:

"A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

The decision on which the learned Solicitor-General has placed the greatest reliance is *Attorney-General of New South Wales v. Collector of Customs for N. S. W.*¹ That was a case in which an action was brought by the Attorney-General of New South Wales to recover from the Collector of Customs for New South Wales a particular sum being the amount of duties of Customs demanded by the defendant upon the importation into the Commonwealth of certain steel rails, and paid under protest by the Government of the State of New South Wales. The rails in question were purchased in England by the State for use in the construction of the railways of the State. On their arrival at the port of Sydney the defendant claimed that they were liable to customs duties. The State disputed its liability to pay duty and deposited the amount claimed under protest. A case was stated for the opinion of the High Court of Australia on two main questions: (1) whether the provisions of the Customs Act, 1901, and the Customs Tariff, 1922, affected the Crown as representing the community of New South Wales; and (2) whether the steel rails were exempt from duty by virtue of section 114 of the Constitution. So far as the first question was concerned Griffith, C.J., said that it was concluded by the decision in *The King v. Sutton*². So far as the second question was concerned, the majority of Judges held that customs duties whether capable or not of being included in the word "tax", are not a tax upon property in the sense in which that expression is used in section 114. Isaacs, J., held that duties of customs, as ordinarily understood and as enacted in the Customs Act, were imposed on the goods themselves, and, therefore, "on property" within the meaning of section 114, but they did not come within the meaning of the word "tax" as used in that section and the Constitution generally. Griffith, C.J., not only drew a distinction between direct and indirect taxation but also held that section 114 applied only to property within the limits of the Commonwealth and did not apply to goods in process of coming within those limits. He further held that the power to impose taxation conferred by section 51 (ii) as well as the power to regulate importation conferred by section 51 (i) were paramount and unlimited and a construction which would make the words of section 114 consistent with giving full effect to the plain intention of section 51 should be preferred. He proceeded on the footing that the words of section 114 were capable of two constructions. Then he observed:

"There is no doubt that in some contexts the words 'impose any tax' might be capable of application to duties of customs. Nor is there any doubt that the word 'taxation' in section 51 (ii) includes the levying of duties of customs. But these duties are nowhere in the Constitution described as a 'tax', unless the use of the word 'taxation', in section 51 (ii) is such a description of them; nor is the levying of them ever spoken of as the imposition of a tax on property. Section 86 speaks of 'the collection and control of duties of Customs and of Excise.' Sections 88, 89, 90, 92, 93, 94, 95 all speak of the 'imposition' of duties of Customs. Such duties are imposed in respect of 'goods' and in one sense, no doubt, 'upon' goods, which is only another way of saying that the word 'upon' is sometimes used as synonymous with 'in respect of'. In the same way the word 'upon' or 'on' is used colloquially in speaking of stamp duties, succession duties, and other forms of indirect taxation, as taxes on deeds, and/or on real and personal property. Yet it is recognised that these forms of taxation are not really taxation upon property but upon operations or movements of property."

Higgins, J., based his decision on a somewhat different ground. He said that he could not confidently take the ground that a customs duty could not be a tax within the meaning of the word "tax" in section 114. He said that section 114 did not use the expression "tax of any kind", but spoke of "any tax on property of any kind belonging to a State." He derived the idea of ownership as the crucial test by reason of the use of the expression "property of any kind belonging etc." The learned Judge observed:

"The prohibition as to State taxation was, no doubt, suggested by the British North America Act, section 125. But by substituting the word 'property' for 'lands or property', the intention—if it was the intention—to confine the prohibition to what are known as 'property taxes' has been somewhat obscured. Property is, by the Constitution, subject to be taxed at the instance of the State as well as of the Commonwealth; customs taxation is solely a matter for the Commonwealth (section 90). Taxes of retaliation, as between the States and the Commonwealth, are possible as to property taxes; but are impossible as to customs taxes. But whatever may have been the

motive which led to this express prohibition, in addition to the prohibition which this Court has held to be implied from the nature of the Constitution as to the taxation of State or Commonwealth agents, the phraseology is such as to point to taxation of property *as property* as being the subject of this express prohibition. "A State shall not, without the consent of the Parliament or the Commonwealth.....impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State".

We are of the view that the considerations which led the learned Judges to the conclusion at which they arrived are not considerations which are available to us under our Constitution. We are dealing with an exemption clause under Article 289 (1); that exemption clause has to be interpreted with the key furnished by Article 366 (28). Under our Constitution the word 'taxation' has been defined by the Constitution itself and we are not free to give a different meaning to the word so as to make a distinction between direct and indirect taxation, or between taxation of property within the limits of the Commonwealth and property in the process of coming within those limits; nor are we free to make a distinction between a tax on property and a tax in respect of property. It is further significant that section 114 of the Commonwealth of Australia Act, 1900, uses the expression "tax on property". Our exemption clause in Article 289 uses a different phraseology which does not qualify the word 'tax' in any way, but says that the property and income of a State shall be exempt from any tax or impost whether general, local or special, to be imposed by the Union. Even in the matter of section 114 of the Commonwealth of Australia Act, 1900, there was a difficulty in drawing the distinction between property and the importation of property, because of the use of the expression "of any kind" in section 114. This difficulty is pointed out by Nicholas in *The Australian Constitution* (second edition, page 143). He says:

"The solution was found in distinguishing between property and the importation of property and between duties and taxation as those terms are used in the Constitution. Both distinctions involved some difficulties, for section 114 uses the words "of any kind" and the only express authority to impose duties is to be found in section 51 (ii). The policy thus sanctioned has not been approved in all States alike. States have been compelled to pay duties on imported materials, including locomotives of a type not made in Australia, so that the proceeds of their loans have been reduced for the benefit of the Commonwealth revenue and the power of exemption has not been used where it might have been (Report of the Royal Commission, p. 361)."

Apropos the Australian case it may perhaps be pointed out that under our Constitution the 'taxing power' is treated as different from the 'regulatory power'. Again, as we have stated earlier, the classification between 'direct' and 'indirect' taxes has not been adopted by our Constitution. Moreover the problem which falls for our consideration under Article 289 is not one which has to be examined from the point of view of legislative power. The problem before us is really the extent of the immunity or exemption granted by Article 289. In *Attorney-General for Saskatchewan v. Canadian Pacific Railway Company*¹, the question arose of construing an exemption granted to the Canadian Pacific Railway Company by clause 16 of a contract between the Canadian Government and the said company. The exemption clause provided *inter alia* that

"the Canadian Pacific Railway, and all stations and station grounds, workshops, buildings, yards and other property, etc., shall be for ever free from taxation by the Dominion, or by any Province hereafter to be established, or by any municipal corporation therein."

The Province of Saskatchewan was constituted in 1905 and in purported compliance with its obligations under the aforesaid exemption clause, the Dominion Parliament provided in section 24 of the Saskatchewan Act of 1905 that

"the powers hereby granted to the said Province shall be exercised subject to the provisions of clause 16 of the contract."

The Canadian Pacific Railway Company raised the question that it was free from business tax imposed by the City Act, 1947, of Saskatchewan by reason of the exemption clause. Before the Judicial Committee of the Privy Council it was argued on behalf of the Province of Saskatchewan that the exemption was limited to taxes imposed upon the owner in respect of the ownership of the property liable to taxation, but the exemption did not extend to taxes levied upon the company in respect of its business of operating it. Dealing with this argument the Judicial Committee said:

1. L.R. (1953) A.C. 594.

"While the language of clause 16 is that the property shall be 'forever free from taxation' by any Province thereafter to be established, it is said that to tax the company in respect to the use of the property (itself a term of the exemption), is not to tax the property and that that alone is prohibited."

Their Lordships construed the exemption on its own terms and held that a tax upon the owner in respect of the use of the property was as much within the exemption as a tax on the property itself. In our view the exemption clause in Article 289 must similarly be construed on its own terms. We further consider that no question of paramountcy of legislative power arises in that connection.

On behalf of the States, except the State of Maharashtra which has supported the stand of the Union in the matter of excise duties only, it has been very strongly contended before us that for the purpose of the exemption clause in Article 289 nothing turns upon the distinction between a tax on property as such and a tax in relation to property. Both affect property and if property is to be free from Union taxation, it makes no difference whether the tax is on the ownership or possession of property or is on its production or manufacture or its importation or exportation. A large number of decisions were cited before us as to the true nature of customs duties and excise duties. There are a number of decisions of this Court where it has been held that a duty of excise is a tax on goods produced or manufactured in the taxing country; similarly customs or export duty is a duty imposed on goods which are the subject of importation or exportation. This is also clear from the provisions relating to "draw back" in the matter of customs duties and refund rules in the matter of excise duty. We consider it unnecessary to examine these decisions in detail for the purpose of the problem before us. It is enough to point out that in order to determine whether an impost, be it a tax, duty or fee, falls under one item or the other of the Legislative Lists in the Seventh Schedule, it may be necessary to examine the nature of the tax, duty or fee. As the Judicial Committee pointed out in *Governor-General in Council v. Province of Madras*¹, a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced; it is however a tax on goods, to be distinguished from a tax on sales or the proceeds of sales of goods; the two taxes, the one levied on the manufacturer in respect of his goods, the other on a vendor in respect of his sales may in one sense overlap. But in law there is no overlapping, the taxes being separate and distinct imposts. But, as we have said earlier, the problem before us is not the nature of the impost but rather the extent of the immunity granted by Article 289 of the Constitution. The extent of that immunity, as we have indicated earlier, really depends on the true scope and effect of Articles 245, 285, 289 and 366 (28) of the Constitution. In the matter of the extent of the immunity the distinction between a tax on property as such or in relation to property is really of no materiality. A tax on property as such and a tax in relation to property—both affect property—and if the true scope and effect of the Articles which we have mentioned is that State property must be exempt from imposition of any tax or impost, whether general or local or special, by the Union, then the distinction drawn between a tax on property as such and a tax in relation to property loses its significance.

For the reasons given above our opinion is that the answers to the three questions referred to this Court must be in the affirmative and against the stand taken by the Union.

Hidayatullah, J.—As a result of a proposal to introduce in Parliament a Bill to amend section 20 of the Sea Customs Act, 1878 (VIII of 1878) and section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) with a view to applying the provisions of these two Acts to goods belonging to the State Governments, the President of India has been pleased to refer under Article 143 of the Constitution, three questions for the opinion of this Court to ascertain if the proposed amendments would be constitutional. These questions are :

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For the reasons given above our opinion is that the answers to the three questions referred to this Court must be in the affirmative and against the stand taken by the Union.

Hidayatullah, J.—As a result of a proposal to introduce in Parliament a Bill to amend section 20 of the Sea Customs Act, 1878 (VIII of 1878) and section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) with a view to applying the provisions of these two Acts to goods belonging to the State Governments, the President of India has been pleased to refer under Article 143 of the Constitution, three questions for the opinion of this Court to ascertain if the proposed amendments would be constitutional. These questions are :

1. (1945) F.C.R. 179 : (1945) 1 M.L.J. 225 : L.R. 72 I.A. 91 at 103.

"(1) Do the provisions of Article 289 of the Constitution preclude the Union from imposing or authorising the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that Article ?

(2) Do the provisions of Article 289 of the Constitution of India preclude the Union from imposing, or authorising the imposition of, excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that Article ?

(3) Will sub-section (2) of section 20 of the Sea Customs Act, 1878 (VIII of 1878), and sub-section (1-A) of section 3 of the Central Excises and Salt Act, 1944 (1 of 1944) as amended by the Bill set out in the Annexure be inconsistent with the provisions of Article 289 of the Constitution of India ? "

The sections of the two Acts as they stand today provide for the levy of customs duties and duties of excise on all goods belonging to a State but only if used for purposes of trade or business of any kind carried on by or on behalf of that Government, or of any operations connected with such trade or business, as they apply in respect of goods not belonging to any Government. These two sections as at present read :

" 20. (1) Except as hereinafter provided, customs duties shall be levied at such rates as may be prescribed by or under any law for the time being in force, on—

(a) goods imported or exported by sea into or from any customs port from or to any foreign port ;

(b) opium, salt or salted fish imported by sea from any customs port into any other customs-port ;

(c) goods brought from any foreign port to any customs port, and, without payment of duty, there transhipped for, or thence carried to, and imported at, any other customs port ; and

(d) goods brought in bond from one customs port to another.

(2) The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government of a State and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government.

Explanation.—In this sub-section ' State ' does not include a Union territory "

" 3. (1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in or imported by land into, any part of India as, and at the rates set forth in the First Schedule.

(1-A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government of a State other than a Union territory and used for the purposes of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods which are not produced or manufactured by any Government "

The proposal is to amend the two sections as follows :

Amendment of section 20 (Act VIII of 1878).—In section 20 of the Sea Customs Act, 1878, for sub-section (2) the following sub-section shall be substituted, namely:—

" (2) The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government as they apply in respect of goods not belonging to the Government."

Amendment of section 3 (Act 1 of 1944).—In section 3 of the Central Excises and Salt Act, 1944, for sub-section (1-A) the following sub-section shall be substituted, namely :—

" (1-A) The provisions of sub-section (1) shall apply in respect of all excisable goods other than salt which are produced or manufactured in India by, or on behalf of, the Government as they apply in respect of goods which are not produced or manufactured by the Government."

The question is one of great importance not only to the States but also to the Union. What the Union wishes to do is to put the State Governments on its tax-payers' list, not only in respect of their trading activities but also in respect of their governmental functions. If the Constitution does not prohibit it there can be no doubt about the power. The sole question thus is whether the Constitution has not prohibited this by Article 289 to which reference will be made presently.

Our Republic is composed of States with their own Governments. These Governments possess and exercise their own powers like any other Government.

Then there is the Union Government which within its own sphere is supreme but its supremacy is not a general or undefined supremacy. It is in certain respects curtailed to give supremacy to the State Governments. One such curtailment is to be found in Article 289 (1) and the only question that can really arise is to what extent does that restriction go ?

We are concerned here with the taxing power of Parliament which admittedly extends to the levying of duties of customs including export duties (Entry 83, List I, 7th Schedule) and duties of excise on tobacco and other goods manufactured in India except those expressly mentioned in the Entry (Entry 84, *ibid*). In addition to the powers of taxation, Parliament has exclusive regulatory power over "trade and commerce with foreign countries ; import and export across customs frontiers" (Entry 41, *ibid*) and also over "inter-State trade and commerce" (Entry 42, *ibid*). The power derived from these Entries is plenary and can only be the subject of restraint if the Constitution so provides. Under Article 245, this power is expressly stated to be subject to the provisions of the Constitution. By Article 246, which divides the subject-matter of laws to be made by Parliament and by the Legislature of the States, exclusive power is given to Parliament in respect of matters enumerated in the Union List. Similarly, exclusive power is conferred on State Legislatures in respect of matters enumerated in the State List. There is a third List called the "Concurrent List" and it contains matters over which Parliament and the Legislatures of the States have power to make laws. Inconsistency between the laws is avoided by Article 254 which makes the law made by Parliament, whether before or after the law made by the State Legislature, to prevail over the latter. In addition to these provisions, Parliament has power to make laws for the territory of India not included in a State even on matters enumerated in the State List and also exclusive power to make any law with respect to any matter not enumerated in the Concurrent or the State Lists. This, in brief, is the scheme of legislative relations and the distribution of legislative power under our Constitution. The three Lists contain Entries which enable the raising of money by way of taxes, duties and fees. The taxation Entries are to be found in the Union and State Lists only. There are only two Entries in the Concurrent List which deal with (a) stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duties (Entry 44, Concurrent List), and (b) fees in respect of any of the matters in that List but not including fees taken in any Court (Entry 47, *ibid*). The other two Lists contain Entries which enable the Union and the States to impose taxes, duties and fees to raise revenue for their respective purposes. These Entries, as far as human ingenuity could achieve, attempt to make a clear-cut and fair division. There is an elaborate procedure for distribution of the proceeds of some of the taxes raised by the Union among the States to finance their activities but we are not presently concerned with it.

The powers of taxation being plenary except in so far as the exercise of the power could be said to trench upon the exclusive domain outlined and demarcated in a rival List, there was a danger in the dual form of Government, which has been adopted in our Republic, of one Government taxing another whether to start with or as a retaliatory measure. Such a possibility had earlier been envisaged by other Federal Constitutions either expressly or as an implication of the dual form and immunity of some kind had been conferred in respect of property, etc., between the respective Governments. Our Constitution has also made provision in that behalf. Those provisions are to be found in Parts XII and XIII. The latter part has been the subject of much anxious thought recently in this Court, and it provides for freedom of trade, commerce and intercourse within the territory of India. Articles 285-289 of Part XII provide for immunity from tax in certain other circumstances. Of these, Article 286, which involves restrictions on the imposition of tax on the sale and purchase of goods, has been before this Court on many occasions and need not be considered. Article 285 provides for exemption of the property of the Union from State taxes, and Article 289, for exemption of property and income of a State from Union taxation. We are primarily concerned with Article 289 in this Reference.

Articles 287 and 288 provide for special exemption from taxes on electricity in certain cases and are not relevant to the present purpose.

Putting aside Articles 286, 287 and 288, I set out below Articles 285 and 289 :

"285 (1).—The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any Authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any Authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State".

"289 (1).—The property and income of a State shall be exempt from Union taxation:

(2) Nothing in clause (1) shall prevent the Union from imposing or authorising the imposition of, any tax to such extent if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government".

These are the provisions of the Constitution which the President of India has in mind in making this Reference to determine whether the proposed extension of customs and excise duties to all goods belonging to the State Governments, imported or exported in the one case and manufactured or produced in the other, would not offend Article 289.

It may be mentioned at this stage that under the Government of India Act, 1935, sections 154 and 155 also provided for similar immunity, but these sections were slightly differently worded. I quote these sections for further comparison:

"154. *Exemption of certain public property from taxation.*—Property vested in His Majesty for purposes of the Government of the Federation shall, save in so far as any Federal law may otherwise provide, be exempt from all taxes imposed by, or by any Authority within, a Province or Federated State :

Provided that, until any Federal law otherwise provides, any property so vested which was immediately before the commencement of Part III of this Act liable, or treated as liable, to any such tax, shall, so long as that tax continues, continue to be liable, or to be treated as liable, thereto."

"155. *Exemption of Provincial Governments and Rulers of Federated States in respect of Federal taxation.*—(1) Subject as hereinafter provided, the Government of a Province and the Ruler of a Federated State shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income accruing, arising or received in British India ;

Provided that—

(a) Where a trade or business of any kind is carried on by or on behalf of the Government of a Province in any part of British India outside that Province or by a Ruler in any part of British India, nothing in this sub-section shall exempt that Government or Ruler from any Federal taxation in respect of that trade or business, or any operations connected therewith, or any income arising in connection therewith, or any property occupied for the purposes thereof ;

(b) nothing in this sub-section shall exempt a Ruler from any Federal taxation in respect of any lands, buildings or income being his personal property or personal income.

(2) Nothing in this Act affects any exemption from taxation enjoyed as of right at the passing of this Act by the Ruler of an Indian State in respect of any Indian Government Securities issued before that date."

As I have said already, dual Government in a Federation requires the protection of one Government from taxation by the other. In the United States of America, there is no specific provision but such an immunity is held to be implied in the nature of dual Government. In Canada, section 125 of the British North America Act, 1867, provides :

"No lands or property belonging to Canada or any Province shall be liable to taxation."

In the Australian Constitution, which, one of its framers (Mr. Justice Higgins) described as a "pedantic imitation" of the American Constitution, section 114 provides :

"A State shall not without the consent of the Parliament of the Commonwealth, raise or maintain any Naval or Military Force, or impose any tax on property of any kind belonging to the Com-

monwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State".

Even in Constitutions which are comparatively recent, like those of Argentina and Brazil, we find similar provisions. Article 32 of the Constitution of Brazil provides :

"The Union, the States and the Municipalities are forbidden—

(c) to tax goods, income or services of each other."

In the arguments before us at which the Solicitor-General of India for the Union and Advocates-General of some of the States and other learned Counsel assisted, two distinct lines of thought were discernible. One line was to rely upon certain American, Canadian and Australian decisions where restrictions under the respective Constitutions were either upheld or negatived, and then to reason from analogy. The other line was to take the words of the Constitution and to see what the Constitution has meant to say. These two lines represent the classic approach to the interpretation and construction of a written Constitution. Cooley explained the difference between them¹ by saying that interpretation "is the art of finding out the true sense of any form of words ; that is, the sense which their author intended to convey", while construction is "the drawing of conclusions, respecting subjects that lie beyond the direct expression of the text, from elements known from and given in the text ; conclusions which are in the spirit, though not within the letter of the text". With a written Constitution, such as we have, the task in most cases must be one of interpretation, but where the language of the Constitution suggests that what was previously passed upon by the Superior Courts of other countries in parallel matters has obviously been taken as a guide, one may have to go a little further than the text to find out what was being sought to be achieved and what was being avoided. I am aware that in *Webb v. Outtrim*², Lord Halsbury observed that it was impossible to say of the framers of the Australian Constitution what their supposed preferences were. I am also conscious of the fact that the Indian Constitution is a document framed by the Indian people for the Indian people. In interpreting the Constitution, one must not completely cast off the moorings to the text of the Constitution and drift into alien seas. I may say, however, that there are indications in the Constitution itself of compelling force which show that the framers were desiring to avoid some of the implications of these rulings of the Superior Courts of the United States, Canada and Australia. The observations of these learned Courts have been pressed into service by Counsel before us, as they form the historical background of the provisions of our Constitution. I also find it convenient to deal with them first as they prepare us to understand our own Constitution. Perhaps by seeing the problem in other settings and environments, one is able to see it better in one's own.

I shall begin with the United States of America, because the doctrine had its first beginnings there. In the United States, the immunity of one Government from taxation by the other arose as an indispensable implication of the dual system. It had its roots in what Mr. Justice Frankfurter described as a "seductive cliché" of Chief Justice Marshall in *McCulloch v. Maryland*³, that the power to tax involves the power to destroy by the tax. But the doctrine was more than a mere cliché ; it was stated by Chief Justice Marshall to be fundamental to dual Government. Let me recall his words :

"If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its Government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach, all those which are conferred by the people of the United States on the Government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved as we ought to be, from clashing sovereignty ; from interfering powers ; from a repugnancy between a right in one Government to pull down what

1. *Constitutional Limitations*, page 97.

2. L.R. (1907) A.C. 81.

3. 4 Wheaton 316.

there is an acknowledged right in another to build up ; from the incompatibility of a right in one Government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use and what degree may amount to the abuse of the power”.

The Chief Justice, therefore, concluded in these famous words :

“The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that, the States have no power by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the Constitution laws enacted by Congress to carry into execution the powers vested in the general Government. This is we think, the unavoidable consequence of that supremacy which the Constitution has declared”.

This doctrine had early dissenters and chief among them was Mr. Justice Bradley who described it as founded on a fallacy which would lead to mischievous consequences. *Collector v. Day*¹. *McCulloch's Case*², involved a State tax which was really discriminatory against the operations of a national bank and could have been decided without laying down any such proposition. But the doctrine was accepted and it grew and grew. It took in not only the property and activities of a Government within its protection but also all means, agencies and instrumentalities by which Government acts. It was only after many years that the reach of the doctrine began to be curtailed. In the *Panhandle Oil Co. v. Mississippi*³, Mr. Justice Holmes did away with the cliché by the trenchant observation “the power to tax is not the power to destroy while this Court sits”. But it was only the increasing dissents which led to the overthrow of a good dozen cases in *Graves v. New York*⁴.

I need not enter into the history of the process by which the doctrine was curtailed. I shall refer to that part only which has withstood the attrition to which the doctrine was subjected. In the *State of South Carolina v. U. S.*⁵ (a case relied upon by the States to explain Article 289), the State had taken over the business of selling intoxicating liquors in the exercise of its sovereign powers. The dispensing and selling agents of the State were charged, under a Federal Revenue Statute, an excise licence tax which was imposed on all sellers of intoxicating liquors. It was held that the agents were not protected by the doctrine because they were doing business and not carrying on functions of Government. Mr. Justice Brewer gave the reason in these words :

“Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.”

Mr. Justice Brewer pointed out that in this way control of all public utilities, of gas, of water and of the rail-road systems would pass to the States and the States would become owner of all property and business and then what would the States contribute to the revenues of the nation ? He held that the tax was not imposed on any property belonging to the State, but was a charge on a business before any profits were realized therefrom, or in other words, upon the means by which that property was acquired but before it was acquired. In that case, the distinction between State as a trader and State as Government was made. This distinction was emphasized later in *Ohio v. Helvering*⁶, where it was observed :

“When a State enters the market place seeking customers it divests itself of its quasi sovereignty *pro tanto* and takes on the character of a trader, so far at least, as the taxing power of the Federal Government is concerned”.

In subsequent cases, this distinction between governmental functions and functions as a trader was preserved. The term ‘governmental functions’ was further qualified by the words ‘strictly’, ‘essential’ or ‘usual’. It was even said that these functions must be those in which State Governments must be ‘traditionally engaged’ otherwise they would not be able to withdraw from the taxing power of the general Government. A certain amount of strictness in the application of the

1. 11 Wall. 113 20 L. Ed. 122.

2. 4 Wheaton 316.

3. 277 U. S. 218, 223 : 72 L. Ed. 857 at 859

4. 306 U.S. 466.

5. 199 U.S. 437.

6. 292 U.S. 360.

doctrine was noticeable in the *University of Illinois v. U. S. A.*¹. In that case, the University imported scientific apparatus for use in one of its departments. Customs duties were exacted which were paid under protest, the University claiming to be an instrumentality of the State of Illinois, discharging a governmental function. The Tariff Act of 1922, under which the impost was made, was an Act to provide revenue, to regulate commerce with foreign countries, and to encourage the industries of the U.S.A. Relying on *Gibbons v. Ogden*², it was pointed out in the case that the power to regulate was plenary and exclusive and its exercise could not be limited, qualified or impeded to any extent by State action and that there was a denial to the State to lay imposts or duties on imports and exports without the consent of the Congress (Articles 1, 10, 2). It was, therefore, laid down that the principle of duality did not touch regulation of commerce with foreign countries. It was argued that the Tariff Act laid a tax and the tax fell upon an instrumentality. It was conceded that it might be so, but it was pointed out that the imposition of customs duties could be for purposes of regulation and that the provisions took into account foreign trade and regulated it and revenue was incidental and the protection did not go beyond governmental functions. Chief Justice Hughes then observed :

"The fact that the State in the performance of State functions may use imported articles does not mean that the importation is a function of the State Government independent of federal power."

"To permit the States or their instrumentalities to import commodities for their own use, regardless of the requirements imposed by the Congress, would undermine, if not destroy, the single control which it was one of the dominant purposes of the Constitution to create. It is for the Congress to decide to what extent if at all, the States and their instrumentalities shall be relieved of the payment of duties on imported articles."

The regulatory aspect of taxes on commerce was again recently the subject of discussion in the United States Supreme Court in what is popularly called the 'Soft drink case'. Natural mineral waters in the State were bottled and sold and it was held by majority that a non-discriminatory tax on all persons was payable by the Government of the State because in selling mineral waters, even though a part of the natural resources of the State, it was not carrying on a governmental function and the tax did not affect its sovereignty. Mr. Justice Frankfurter said :

"Surely the power of Congress to lay taxes has impliedly no less a reach than the power of the Congress to regulate commerce. There are of course State activities and State-owned property that partake of uniqueness from the point of view of inter-governmental relations. These inherently constitute a class by themselves. Only a State can own a State house ; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes such enterprises organised for private ends."

Mr. Justice Frankfurter rejected as untenable such criteria as 'proprietary' against 'governmental' activities of the States or 'historically sanctioned activities of Government' or 'activities conducted mostly for profit', and found "no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject-matter." Mr. Justice Rutledge did not agree with the last extension but chose not to differ. Chief Justice Stone, with whom Justices Read, Murphy and Burton agreed, pointed out that in the United States the cases were divisible into two parts those in which there was taxing of property, income or activities of the State, and those in which the tax was laid on agents and instrumentalities of the State, which tax was said to impede or cripple indirectly the State. They held that the distinction between governmental and proprietary interests was untenable, and agreed that a non-discriminatory tax could sometimes be laid on the State, provided it did not affect its sovereignty, but the essence of the matter was not that the tax was non-discriminatory but because unduly interfered with the performance of the State's functions of Government. Holding, therefore, that the tax

in question there did not curtail the State Government in its functions, it was pointed out that the Constitution could not be read to give "immunity to the State's mineral water business from Federal taxation" or to deny to the Federal Government power to levy the tax. Mr. Justice Jackson took no part but Justices Douglas and Black entered a powerful dissent. The opinion was based on the theory that the taxing power of either Government if exercised against the other was likely to affect the cost of its operation and "if the Federal Government can place the local Governments on its tax collector's list, then, capacity to serve the needs of their citizens is at once hampered or curtailed".

From the above analysis of the American cases (and all of them were within the ken of our Constituent Assembly), we gather that the immunity now does not extend to agents, means or instrumentalities as it did previously, and that it does not extend to any trading or business activity of the State even though the trading involves natural resources (though it is conceded that the Congress may excuse trading in a suitable case). It extends to the property of the State owned as State but not in the course of trading. The marginal cases are those where the tax which is laid, interferes unduly with the State as a State, and it is held by narrow majority that except for such marginal cases, the States are not immune. The contention on behalf of some of the States is that the distinction made by Brewer, J., in the *South Carolina case*¹ has been preserved in the scheme of Article 289, and if import and export are in the discharge of essential governmental functions, there must be exemption from customs duty but not if there is trading. Similarly, it is contended that there is exemption from excise duty based on the same or similar considerations. In other words, the claim is that our Constitution reproduces in its broad features the doctrine as understood in the United States till the time of the framing of our Constitution.

There can be no doubt that the broad features of Article 289 correspond to the American doctrine as understood before our own Constitution was framed. Article 289 grants an exemption from taxation to the property and income of the States. What that comprehends I am leaving over for discussion till after I have touched upon the Canadian and Australian Constitutions and referred to cases decided in connection therewith. Article 289, however, quite clearly limits the exemption against taxation in such a way as to make the trading activities of the States and the property used or occupied for the purposes of such trade or business, liable to taxation. This follows indubitably from clause (2). Without attempting to expound exegetically the words of that clause and its relation to clauses (1) and (3), I find it sufficient to say that clause (2) puts outside the exemption granted by clause (1) all trading activities of the State and property used in that connection. The force of the opening words "Nothing in clause (1)" does not make clause (2) an exemption to clause (1). These words emphasize that the existence of the power declared by clause (2) is really unaffected by clause (1). This is the trend of opinion in the U.S.A., as I have pointed out. The same opening words are repeated in clause (3) and the final words "incidental to the ordinary functions of Government" show that even trading can be regarded, if Parliament so declares by law, as "incidental to the ordinary functions of Government". This is again recognized in the U.S.A., where Statutes sometimes include special exemptions in favour of the trading activities of the States.

It follows, therefore, that the general outline of Article 289 is based upon the American pattern that the property and income of the States are not to be taxed, that trading is not an ordinary function of Government though Parliament may by law declare that any trade or business or any class of trade or business is incidental to functions of Government.

So far I have dealt with the general pattern only and traced its similarity to the American doctrine. It may be pointed out even at this stage that there is no immunity in respect of the agents or instrumentalities of Government in our Constitution. The exemption is in respect of the "property and income of a State". The force of

these words appears from other cases under the Canadian and Australian Constitutions. I shall deal with Australia first, because the leading case under that Constitution was decided before the leading case under the Canadian Constitution.

I have already quoted section 114 of the Commonwealth of Australia Constitution Act. The material portion of it may be reproduced here :

"A State shall not.....impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to the State."

The doctrine of immunity of instrumentalities as an implied prohibition in the Constitution was held inapplicable to Australian Constitution by the Supreme Court of Victoria before the High Court was constituted but the High Court in the first case applied the doctrine. See *D'Emden v. Pedder*.¹ It is hardly necessary to trace the history of the doctrine as it was rejected in what is called the *Engineers' case*.² It was, however, held in *D'Emden v. Pedder*¹, that section 114 only referred to "tax on property" as such and was a prohibition different from that contained in the American Doctrine. The matter came to a head in two cases in 1908. In *King v. Sutton*³, a quantity of wire netting purchased in England and imported into the Commonwealth by the Government of New South Wales was landed at port of Sydney. Without any entry having been made or passed and without the permission of the Customs Officers, it was removed under the executive authority of the State. The Customs Authorities proceeded against the defendant under sections 36 and 236 of the Customs Act of 1901. It was held that the Customs Act, 1901, was a valid exercise of the exclusive power of the Commonwealth conferred by sections 52 (ii), 86 and 90 of the Constitution Act to impose, collect and control duties of customs and excise, and the Act applied to goods imported by the Government of a State just as it applied to private persons and the goods which were subject to the control of the Customs Authorities under section 30 could not be removed contrary to the provisions of the Act. On the following day, the High Court delivered judgment in the *Attorney-General of New South Wales v. The Collector of Customs*⁴, in which section 114 was considered. That was an action brought to recover from the defendant the amount of customs duties demanded and paid under protest in respect of the importation into the Commonwealth of certain steel rails by the Government of the State of New South Wales. The rails were purchased in England and were shipped to the Secretary for Public Works of the State. At that time the current of authority in Australia was in favour of applying the American doctrine of immunity of instrumentalities as laid down by the High Court in *D'Emden v. Pedder*¹, though in that case, it was already held that section 114 dealt with "tax on property", and it was a very different matter. The State sought the protection of section 114. It was held that the doctrine had no application to powers expressly granted to the Commonwealth which by their very nature involved control of some operations of the State Government and one such grant was the power to make laws with respect to external trade. It was further held that the imposition of customs duties being a mode of regulating trade and commerce with other countries as well as an exercise of the taxing power, the right of the States to import goods must be subject to the Commonwealth power. The Commonwealth power was said to flow from section 51 [(i) and (ii)] which read :

"51. The Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to—

(i) Trade and commerce with other countries, and among the States.

(ii) Taxation ; but so as not to discriminate between States or parts of States".

In this connection, one other section may be quoted :

"55. *Tax Bill*.—Laws imposing taxation shall deal only with the imposition of taxation, and any provision herein dealing with any other matter shall be of no effect.

1. (1904) 1 C.L.R. 91.
2. (1930) 28 C.L.R. 129.

3. (1908) 3 C.L.R. 789.
4. (1908) 5 C.L.R. 818.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only."

In deciding that the State Government was required to pay customs duties on import by it, the provisions of section 114 notwithstanding, the learned Judges gave widely different reasons. Those reasons were pressed into service in the arguments before us, and I shall briefly notice them. Chief Justice Griffith found antinomy in the power of taxation and regulation conferred by section 51 on the one hand and the exemption granted by section 114 on the other, and held that if a construction was possible which would harmonise the two, it was to be preferred. The learned Chief Justice, therefore, examined the scheme of the Constitution Act and found that though the word 'taxation' in section 51 (ii) included customs duties, the latter were not described as 'tax' in the Constitution or as 'tax on property'. He held that customs duties were a tax on the movement of goods and the word 'tax' in section 114 could not be held to include customs duties because the section mentioned a tax 'on property' 'belonging to a State'. He was of opinion that such property must be within the geographical boundaries of the State and customs duties being collected at the confines of the State were collected before the goods became the property of the State. He concluded, therefore, that the levying of duties of customs on importation was not an imposition of the tax upon property within the literal meaning of section 114, and even if it was, the section must be differently construed in the light of the general provisions of the Constitution Act. Barton and O'Connor, JJ., in separate judgments followed the same line of thought. Higgins, J., pointed out that before the prohibition applied, taxation of property must be 'as property'. His conclusion may be stated in his own words:

"I prefer to base my judgment on the ground which I have stated. I cannot, confidently, take the ground that customs duty cannot be a tax within the meaning of the word 'tax' in section 114. It is true that 'duties of customs' and 'duties of excise' are the usual expressions; but phraseology, such as is used in section 55, shows that the Constitution treats the imposing of such duties as being the imposing of taxes. 'Laws imposing taxation, except laws imposing duties of customs or excise, shall deal with one subject of taxation only.' However the fact that section 114 uses the mere word 'tax'—not 'tax of any kind' although it speaks of 'property of any kind'—strengthens the view that the framers of the section could not have had customs duties in their minds at the time. They lay the emphasis on the thought on ownership—'property of any kind belonging,' etc." (page 855).

Isaacs, J., on the other hand, held that duties of customs as ordinarily understood or in the Customs Act, were imposed on the goods themselves and were, therefore, 'on property' within the meaning of section 114, but did not come within the meaning of 'tax' as used in that section and the Constitution generally. He cited certain authorities to show that though the word 'taxation' when used to confer on Government a power, might carry the amplest meaning, being a generic word, the word tax might or might not be as wide in meaning when used in some other context. The learned Judge found that the word 'tax' was used only in section 114 and did not carry the wide meaning, and coupled with the word 'property' could not be read to include customs duties.

This decision of the Australian High Court was strongly relied upon by the learned Solicitor-General. It will, however, be seen that the construction of words used in section 114 is so intimately connected with the scheme and language of the other parts of the Constitution Act as to be of little assistance to us. The words 'tax' and 'taxation' were not defined in the Australian Constitution, whereas they are, in our own. Further, the distinction between 'tax' and 'taxation' with all due respects is somewhat difficult to apprehend. I can only say in the words of Cassels, J., in a Canadian case to which I shall refer presently that:

"I agree with the Attorney-General for British Columbia in his statement before me as to the difference between taxation and a tax. As the Attorney-General states 'I am not relying very strongly upon that phase of the argument'. He thinks the distinction is rather subtle and thin, so do I."

We shall soon see that the Privy Council did not rely upon this distinction when this case was cited before it.

The decision in the Australian case lays down certain general propositions which may be stated. It recognizes that customs duties have the dual aspect of raising

revenue and of regulating external trade. This proposition, of course, is valid. It was also accepted in the American cases to which I have already referred and also in the Privy Council case from Canada to which I shall make reference. It also decided that the word 'taxation' is sufficiently wide to take in customs duties. This was laid down by Isaacs, J., and cannot be said to be dissented from by the other learned Judges. This proposition is hardly necessary as an aid to construction of our Constitution which uses the word 'taxation', as I pointed out during the course of arguments only, in Article 289, and defines the term :

"Article 366 (28).—'Taxation' includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly."

This gets over the difficulty felt in Australian case generally and particularly by Higgins, J., in the extract I have made from his judgment. The fact that the word 'taxation' is used in one place only in our Constitution saves us from the task of examining the context because the definition would become a dead letter if it were not used in that place in the sense defined. As regards the scheme of the Australian Constitution, there is some similarity in that the powers of taxation conferred by section 51 of the Australian Constitution Act on Parliament are subject to the provisions of that Constitution just as they are in our Constitution but unlike those conferred by the Constitution of Canada. I shall refer to these points which were used in arguments when I deal with our Constitution. I shall now refer to the Canadian case relied upon by the learned Solicitor-General.

Before dealing with the Canadian precedent or the decision on appeal by the Judicial Committee, I find it necessary to refer to a few cases in which the Privy Council explained the general scheme of the British North America Act and the principles on which that Act is to be construed, particularly sections 91-95 of the Act, which deal with the powers of legislation in the Dominion and their distribution between the Dominion Parliament and the Legislatures of the Provinces. Without having those principles before one, there is a danger of misapprehending the implications of the cases relied upon by the learned Solicitor-General. It is not necessary to reproduce sections 91 and 92 in their entirety beyond the opening words which have a direct bearing upon the problem decided in the Privy Council case. Section 91, in so far as is material to our purpose, reads :

"Section 91.—"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces ; and for greater certainty, but not so as to restrict the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

.....
(Then follows an enumeration of twenty nine classes of subjects.)

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Section 92 is as follows :—

"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—"

* * * * *
(Then follows an enumeration of sixteen classes of subjects)

In dealing with the general scheme of the Act, the Board in *The Citizens Insurance Company of Canada v. William Persons and The Queen Insurance Company v. Williams Persons*¹, pointed out that the scheme was to give primacy to the Dominion Parliament in cases of conflict of power *notwithstanding anything in the Act* and explained how the exclusiveness of the spheres of the two legislatures was intended to work. The position was again summed up the next year in *Russel v. Queen*² the report of which is to be found in the same volume at p. 829. Again in

*Tennant v. Union Bank of Canada*¹, it was held that section 91 (No. 15) of the British North America Act gave the Dominion Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interfered with property and civil rights in the Province (sections 92, 20, 13) and conferred upon the bank privileges as a lender which the Provincial law did not recognize. The decision was rested once again on the doctrine of paramountcy of Dominion Parliament notwithstanding anything in the Act so long as it did not fall within the exclusive power of the Provincial Legislature under section 91. Lord Watson observed :

".....But section 91 expressly declares that, 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament."

This primacy of Dominion Parliament was in all matters legislative subject, of course, to what was assigned exclusively to the Provincial Legislatures. But the primacy of Parliament of Canada was untrammelled by anything elsewhere to be found in the same Act.

From the above citations, it is obvious that the general scheme of the British North America Act assigns certain subjects to the exclusive and plenary power of the Dominion Parliament, and certain other subjects exclusively to the Provincial Legislatures. By section 91, the Imperial Parliament has unequivocally placed everything not assigned to the Local Legislatures within the jurisdiction of the Dominion Parliament notwithstanding anything in the Act. The British North America Act thus has to be construed as a whole and with reference first, to the exclusive domain of the Provincial Legislatures, next with reference to the paramountcy of the Dominion Parliament and the general scheme of the Act. Unless a matter falls within section 92 and does not fall within section 91, the action of the Dominion Parliament is subject to no restraint by anything elsewhere to be found in the Act.

We are now in a position to consider the case so strongly relied upon by the learned Solicitor-General. To understand that case, the facts must be seen first. It was a test case by way of an action by the Crown in the right of the Province to have it declared that it could import liquor into Canada for purposes of sale without paying customs duties imposed by the Crown in the right of the Dominion of Canada by virtue of the Customs Act of Canada. The action of the Province of British Columbia was based on the provisions of Government Liquor Act which was declared *intra vires* by the Privy Council in *Canadian Pacific Wine Company, Limited v. Tuley and others*². Before the Exchequer Court, the following admission of facts was filed by the Attorney-General of Columbia :—

"It is hereby admitted, for all purposes of this action, that the case of 'Johnnie Walker' 'Black Label' whiskey, which was purchased and consigned to H.M. King George V in the right of the Province of British Columbia care of Liquor Control Board, Victoria B.C. as alleged in para. 1 of the Statement of the claim filed herein, was so purchased and consigned to meet the requirements of the Government Liquor Stores established in British Columbia under the Government Liquor Act Ch. 30 of the Statutes of British Columbia, 1921, and for the purpose of sale at the said Government Liquor Stores pursuant to the provisions of the said Act."

The contention on the side of the Province was that section 125 of the British North America Act, which provides "No lands or property belonging to Canada or any Province shall be liable to taxation" gave protection against the customs duty. The contention on the side of the Dominion was that the whiskey was not imported for purposes of Government but for trade. It was pointed out that under section 118, large sums were payable by the Dominion to the Provinces and reference was also made to sections 122, 123 and 124, under which customs and excise laws as also certain other dues were to continue until altered by the Parliament of Canada. British Columbia was not a part of the Dominion to start with. It was admitted into the Dominion under section 146 of the British North America Act on May 16,

1. L.R. (1894) A.C. 31 at 41.

2. L.R. (1921) 2 A.C. 417.

1871, by an order of Her Majesty in Council. Section 7 of the Order provided that the existing customs tariff and excise duties would continue in force in British Columbia for sometime. The Dominion Act under which the customs duty was sought to be levied provided as follows :—

“The rates and duties of customs imposed by this Act, or the customs tariff or any other law relating to the customs, as well as the rates and duties of customs heretofore imposed by any Customs Act or Customs Tariff or any law relating to the Customs enacted and in force at any time since the first day of July, 1867, shall be binding, and are declared and shall be deemed to have been always binding upon and payable by His Majesty, in respect of any goods, which may be hereafter or have been heretofore imported by or for His Majesty whether in the right of His Majesty's Government of Canada or His Majesty's Government of any Province of Canada, and whether or not the goods so imported belonged at the time of importation to His Majesty; and any and all such Acts as aforesaid shall be construed and interpreted as if the rates and duties of customs aforesaid were and are by express words charged upon and made payable by His Majesty.

Provided, however, that nothing herein contained is intended to impose or to declare the imposition of any tax upon, or to make or to declare liable to taxation, any property belonging to His Majesty either in the right of Canada or of a Province.”

In the Exchequer Court, Cassels, J., based his decision on the fact that the whiskey was imported not for any governmental purpose but for trade. He, therefore, rejected the claim of the Province following Mr. Justice Brewer's dictum in the *South Carolina case*¹, and referred to two cases of the Privy Council, *Farnell v. Bowman*² and *Attorney-General of the Strait Settlement v. Wemyss*³, in which it was stated that “if a State chooses to embark upon private business in competition with other trades, they should be liable just as other persons engaging in trade”. The Australian case of *Attorney-General of New South Wales v. Collector of Customs*⁴, was referred to but was not followed.

An appeal was taken to the Supreme Court of Canada. The report of the decision is found in *The Attorney-General of the Province of British Columbia v. The Attorney-General of the Dominion of Canada*⁵. It was argued on behalf of British Columbia that in section 125, British North America Act, the word ‘taxation’ included the imposition of customs duties and the word ‘property’ included movable property of all kinds and not merely property as may be incidental to the administration of the Provincial Government. On behalf of the Dominion, it was contended that customs duties did not come within ‘taxation’ but were merely in the nature of regulation of trade and commerce, and further this was not ‘taxation on property’, and *Attorney-General of New South Wales v. Collector of Customs*⁴, was relied upon.

The Court consisted of five learned Judges and they delivered separate judgments. Iddington, J., declined to go into the question whether the word ‘taxation’ would or would not include customs duties. He held that section 125 was in a chapter which dealt with lands and property and thus was confined to property as was mentioned there or in the 3rd and 4th Schedules, and concluded that in view of this context and the nature of the powers given by Nos. 2 and 3 of section 91, the power to demand customs duties must be upheld. Anglin, J., held on the authority of *Attorney-General of New South Wales v. Collector of Customs*¹ that section 125 could not have been intended to give exemptions of this kind, and that customs duties were not only taxes but were also regulatory and were imposed rather on movement across the border than on the goods themselves and were thus not a tax ‘on property’ in Canada. Mignault, J., followed a similar line. Duff, J., entered into a more detailed discussion of the scheme of the British North America Act. He observed that it was a fundamental part of the scheme of Confederation to give amplest authority in relation to external trade exclusively to the Dominion, and customs duties were an instrument of regulation. He, therefore, held that the theory of Dominion primacy must on such a construction of section 125 postulate a power of disallowance of anything which would weaken that control and primacy. He also held that ‘taxation’ in relation to property was less comprehensive in significance than ‘taxation’ *simpliciter*, and though customs duties were taxes on commo-

1. 199 U.S. 437.

2. (1887) L.R. 12 A.C. 643.

3. (1888) L.R. 13 A.C. 192.

4. (1908) 5 C.L.R. 818.

5. 64 Canada S.C.R. 377.

duties in one sense, they were not 'taxes on property' as used in section 123 where the word 'property' was used in the sense of distribution of lands and property between the Dominion and the Provinces. Brodeur, J., held that customs duties in Canada both regulated and raised revenue and the Act under which they were levied laid them 'on or upon goods', and this attracted section 125.

All these reasons were of course pressed into service in the arguments before us. I shall now address myself to the Privy Council judgment on appeal from the Supreme Court. The Privy Council did not express any opinion on these reasons.

Lord Buckmaster referred to the width of section 125 but pointed out that it could not be read in an isolated and disjunctive way. It was to be read as a part of the general scheme of the Constitution Act by which the Dominion was to enjoy exclusive legislative authority over matters enumerated in section 91 which included regulation of trade and commerce and raising of money by any mode or system of taxation. He pointed out that customs duties had these dual functions and whether it was the one function or the other or both, the Dominion alone had the power. The claim of the Provinces that though the Dominion had the power to erect a tariff wall, the Provinces could make a breach in it by virtue of section 125 through which the goods could pass unaffected by the customs duties, was not accepted, because section 125 was a part of a group of sections which distributed property between the Dominion and the Provinces and gave control to the Provinces over properties allocated to them. This did not affect authority conferred by section 91, which power extended to regulation of trade and commerce throughout the Dominion and irrespective of the area of its operation. Lord Buckmaster, therefore, held that this purpose was paramount and section 125 must not be read to defeat it. In other words, the primacy of Dominion Parliament in the matter of regulation of external trade and commerce and taxation of this type was held to be unaffected by section 125. Lord Buckmaster referred to *Attorney-General of New South Wales v. Collector of Customs*¹, but did not apply it and observed that "the true solution is to be found in the adaptation of section 125 to the whole scheme of Government" which the British North America Act defined.

The Canadian decisions are based upon the scheme of the British North America Act which gives paramountcy to the Dominion Parliament which was unaffected by section 125 which found place in a group of sections dealing with the distribution of property between the Dominion and the Provinces.

Now, the arguments in the present case follow the lines taken in the cases I have reviewed. It is contended for the Union that the exclusive power to levy duties of customs and regulation of external trade belongs to Parliament that customs duties both raise revenue and regulate, that they are not 'taxes' much less 'taxes on property', and Article 289 must be interpreted to preserve the exclusive and plenary power of Parliament. On the other side, it is contended that clauses (2) and (3) indicate that the right of Parliament is to tax the trading activities of State Governments but to leave free their ordinary functions as the Governments of the States, and the prohibition in clause (1) of Article 289 is absolute subject only to what is expressly excluded by clause (2). To understand the arguments and to see how the precedents of other countries serve us to understand our Constitution, I shall first analyse the scheme of taxation under our Constitution.

To begin with, it is a matter for reflection whether the word 'property' in Article 289 excludes property imported from foreign countries which has to bear a tax before it can enter the territory of India. The Article bans taxation of property belonging to the Government of a State. If by property is meant only that property which is within the geographical limits of a State, then, property outside those limits and seeking to enter the State across customs frontiers may have to bear customs duty. Similarly, if customs duties do not come within the word 'taxation', the Article is again ineffective to save the property of the State Governments. The Union claims that customs duty is neither 'taxation' nor a 'tax on property'. It is a tax on the

movement of goods across the customs frontier and the protection given by Article 289 (1) does not apply. The scheme of the Constitution clearly shows that neither claim of the Union can be upheld.

The Union List does not include any tax which in the technical or popular sense can be said to be 'property tax' or a tax laid on property as property. These tax Entries begin at No. 82 which is "taxes on income other than agricultural income". Then follow Nos. 83 and 84 which deal with duties of customs and duties of excise. It is these Entries which are the subject of controversy. If these are not to be regarded as taxes on 'property', then, no other tax can be remotely connected with the property of the State in the sense suggested by the learned Solicitor-General. Nos. 85 and 86 deal with companies, and Nos. 87 and 88, with death duties. In extremely rare cases, a State might be the legatee as in *U. S. v. Perkins*¹ and *Snyder v. Bettman*², but it is difficult to imagine that such a case was in contemplation. Terminal taxes and taxes on railway fares and freights of No. 89 may fall upon the States, but under Article 269, the proceeds have to be assigned to the States. No. 90 deals with the taxes other than stamp duties on transactions in stock exchanges and future markets. They are seldom, if at all, likely to fall on the States and the proceeds are also assignable to the States. No. 91 is rates of stamp duties, and No. 92, taxes on the sale or purchase of newspapers and on advertisements published therein, and No. 92-A, taxes on the sale and purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce, are again not taxes such as may be considered to be 'on property'. The net proceeds of these taxes are again to be given to the States. When the question was put to the learned Solicitor-General as to which tax on property was in contemplation, he could only point to the residuary power of Parliament. This shows that unless Article 289 (1) took in Entries relating to customs duties and excise duties, the protection granted by the clause would be largely superfluous or nugatory.

The Government of India Act, 1935, granted exemption in respect of lands and buildings only. The present Article changed the words to 'property and income'. The phrase is exhaustive of all the assets and income of the States. Clause (2) of the Article indicates that the exemption is not to apply to the trade or business carried on by the State and *any tax* can be imposed in respect of such trade or business of *any kind* or *any operations* connected therewith and *any property used or occupied* for the purpose of such trade or business and *any income* accruing or arising in connection therewith. The repeated use of the word 'any' shows that the distinction sought to be made in Australia from the use of the word in one place and its omission in another is not admissible. The words 'used or occupied' show that movable and immovable properties are included. Clause (3) shows that power is reserved to Parliament to declare by law which trade or business or class of trade or business is incidental to the ordinary functions of Government, thus, taking the matter out of the jurisdiction of Courts. Till Parliament so declares, all trade and business of any kind must remain subject to taxation.

From the above, it follows that the three clauses of Article 289 must be read together and harmoniously to gather their correct import. It is not possible to read clause (1) with the assistance of rulings of other Courts. The problem to be faced is : What is included in the expression 'property of a State' ? It must obviously include all property to which the State can lay claim. The word 'property' is wide enough to include immovable as well as movable varieties. Article 289 departed from the language of the Government of India Act, 1935, by discarding 'lands or buildings' and using the more comprehensive expression 'property', and in clause (2) qualified that word by 'any' and by 'used or occupied'. The collocation of these expressions clearly indicates that the property of the State in whatever circumstances situated, was meant and was exempt from taxation and the only property which was made subject to taxation was any property used or occupied for business. Property, which is brought into ownership and possession abroad, or property, which is

1. 163 U.S. 625 : 41 L. Ed. 287.

2. 190 U.S. 249 : 47 L. Ed. 1035.

produced or manufactured by the State, is property of the State. If not, the question may be asked, "Whose property is it then"? and no answer to such a question can be given. I am, therefore, of the opinion that taking the language of Article 289 (1) by itself or even as modified by that of clauses (2) and (3), the conclusion is inescapable that properties of all kinds belonging to the States save those used or occupied for trade or business, were meant to be exempted from 'taxation'. Such property may be immovable or movable and need not be within the geographical limits. This Article is in the Part dealing with "Finance" and is included in a sub-chapter entitled "Miscellaneous Financial Provisions". Its significance is thus not made less by any special considerations as was the case with section 125 of the British North America Act. The powers of legislation, which Parliament enjoys by virtue of the taxation Entries in List I, are expressly subject to the provisions of the Constitution, and Article 289 must, therefore, override unless it be inapplicable. The scheme of Article 289 does not admit that the word 'property' should be read in any specialised sense. I am, therefore, of opinion that goods imported and goods manufactured or produced by the States are included in the word 'property'.

It is next contended that neither customs duties nor excise duties can be said to be "taxation", and even if they can be described as "taxation" or "tax", they are not tax on property. They are said to be taxes on movement of goods in the one case, and taxes on production or manufacture in the other. Many rulings were cited to show that this is the way in which Judges have described these levies. I shall deal with customs duties first because, in my opinion, excise duties are simpler to deal with. Some Judges have described excise duties as "on goods produced", and some, as "on production and manufacture", and it is easy to cite an equal number of cases on either side.

The definition of the word 'taxation' in our Constitution is the most significant fact. It serves to distinguish the Australian cases and it tells us what kind of levy would be hit by Article 289 (1). This is what it states :

" 'Taxation' includes the imposition of any tax or impost, whether general or local or special, and 'tax' shall be construed accordingly."

Though it is not an exhaustive definition and only shows what is included in the word, one is struck immediately by its width of language. Though it speaks of any tax or impost, it goes a step further and adds "whether general, or local or special", indicating thereby that no special or local considerations are relevant and even a general non-discriminatory levy must be regarded as taxation. I have already stated that the word "taxation" is used only in Article 289 (1) and it must be read with all its wealth of meaning into the first clause of the Article. Not to do so would be to make the definition entirely redundant. When the clause is expanded in the light of the definition, it reads :

"The property and income of a State shall be exempt from *any Union tax or impost, whether general or local or special.*"

The italicised portion represents the definition.

The question thus arises why use the word and define it in this comprehensive way if there was no tax in the Legislative Entries in List I which could be said to fall on the property of the States unless one thought in terms of customs duties and excises? According to Wells¹—

"Scientifically considered taxation is the taking or appropriating such portions of the product or property of a country or community as is necessary for the support of its Government by methods that are not in the nature of extortions, punishments or confiscations."

Viewed in this broad way and having in mind that the term 'taxation' as used in the Article was specially defined with great width, the answer to the question posed by me is obvious. But that is not all. The definition speaks of "impost". The word "impost" in its general sense means a tax or tribute or duty and may be on persons or on goods. In a special sense it means a duty on imported goods

1. *Theory and Practice of Taxation*, page 204.

II] REFERENCE UNDER ARTICLE 143 (1) OF THE CONSTITUTION (*Hidayatullah, J.*). 99

and on merchandise. See *Pacific Ins. Co. v. Sonle*¹. In *Ward v. Maryland*², it is stated :

"An impost, or a duty on imports, is a custom or tax levied on articles brought into a country."

The Oxford Dictionary does say that this special meaning is after Cowell and that there is no evidence of the origin. But every dictionary of legal terms will bear out the special meaning. Indeed, the American Constitution classifies "impost" with "duties" and "excises" as indirect taxes in contradistinction to taxes on property or capitation. The word "duties" is sometimes used as synonymous with tax, but in a special sense, it means an indirect tax imposed on the importation or consumption of goods. See *Pollock v. Farmers' Loan and Trust Co.*³

In Article 289 (1), property of the States is exempted from Union taxation. One cannot go by the word "property" alone but must take into consideration the ambit of the word "taxation" also. I have read the definition into the first clause of Article 289. Reading further into the definition the meaning of the word "impost" not as a "tax" (which is unnecessary as the word "tax" has already been used and there is a presumption against tautology) but as a "duty on importation or consumption", one gets this result :

"The property and income of a State shall be exempt from any Union tax or duty on imported goods or merchandise of all kinds."

In other words, property of the States shall be free from direct taxes and indirect taxes.

It will thus be seen that both from the angle of the word "property" as also from the angle of the word "taxation", we reach the two kinds of taxes which are the subject-matter of controversy here. On the other hand, all this width of language is lost completely if these taxes are left out and one goes in search of other possible taxes. The definition may conceivably cover some of them in very special circumstances but the proceeds of those taxes are assignable to the States, and it seems pointless to include them for taxation and then to hand over the proceeds to the States. The distinction between the trading activity of the State Governments and their ordinary functions of Government, which is worked out with such elaborate care on the American pattern, also loses its point. Clause (2) would scarcely be necessary and clause (3), even less.

The next question is whether customs duties and excises are in their true nature taxes on the occasion of importation in the one case and production in the other, and cannot be described as "taxes on property". To begin with, the expression "taxes on property" is not used ; nor is the expression "taxes in respect of property", with which the former expression was compared. The former expression was used in the Australian Constitution Act and the distinction was made by the High Court of that country. We are only concerned to see whether the imports of the States would be free from Union taxation. If by the nature of customs duties as a tax on movement of goods, it cannot be said that the exemption has been earned, there should be an answer in favour of the validity of the amendment. If customs duties can be said to be "tax on property", the answer must be the other way.

In this connection, there is the high authority of Chief Justice Marshall in *Brown v. Maryland*⁴ where he observed :

"An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are 'imports' ? The lexicons inform us, they are 'things imported'. If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought

1. 7 Wall. (U.S.) 433 : 19 L. Ed. 95.
2. 12 Wall. (U.S.) 418 : 20 L. Ed. 449.

3. 158 U.S. 601, 622 : 39 L. Ed. 1108.
4. 12 Wheaton 419, 437 : 6 L. Ed. 678, 685.

into the country. "A duty on imports", then, is not merely a duty on the act of importation, but is a duty on the thing imported."

In *Merriot v. Brune*¹, later approved in *Lawder v. Stone*², it was laid down that customs are duties charged upon commodities on their being imported into or exported from a country. It follows, therefore, that it is not right to say that customs duties are on movement of goods and not upon the goods themselves. A glance at the Sea Customs Act, 1878, which is sought to be amended shows that the legislative practice in our country has been to describe customs duties as laid on the goods or commodities. Section 20 itself, which is sought to be amended, says :

"..... customs duties shall be levied on

(a) goods imported or exported, etc.

(b) opium, salt or salted fish imported, etc.

(c) goods brought from any foreign port to etc.

(d) goods brought in bond from one customs port to another."

Similarly, sections 25, 26, 27, 28, 29, 29-A, 31, 32 and several others mention goods as being the subject of the tax. Section 43, which deals with drawbacks, may be seen in this connection :

"43. When any goods, having been charged with import duty at one customs-port and thence exported to another, are re-exported by Sea as aforesaid drawback shall be allowed on such goods as if they had been so re-exported from the former port".

The duty is laid on goods and it is the goods which earn the drawback. It would be not wrong to say that the whole of the Sea Customs Act speaks of *goods* all the time.

If then the goods be the property of the States and those goods have to bear the tax before rights of ownership can be exercised in respect of them, is it an error to say that the exemption of Article 289 (1) will be available to them, regard being had to the language of the clause read with the definition of "taxation"—

"The property of a State shall be exempt from any Union tax or impost, whether general or local or special"

Indeed, Parliament in 1951, soon after the Constituent Assembly had adopted the Constitution, amended section 20 of the Sea Customs Act, 1878, by inserting sub-section (2) which read :

"The provisions of sub-section (1) shall apply in respect of all goods belonging to the Government of a State and used for the purpose of a trade or business of any kind carried on by, or on behalf of, that Government, or of any operations connected with such trade or business as they apply in respect of goods not belonging to any Government."

This sub-section reproduces clause (2) of Article 289. It views the goods imported as property, customs duties as "taxation", and declares that such goods though belonging to a State Government would bear the tax under the circumstances mentioned in the said clause. If there ever was a perfect instance of *contemporanea expositio*, this must be it. It is not a case of a modern statute being interpreted with reference to an old one. Nor is there any judicial interpretation involved. This is a case of the same body of men enacting a provision in an Act to carry out the intent and meaning of a provision of the Constitution adopted earlier by them. In their understanding of the Constitution, customs duties as levied under the Sea Customs Act, 1878, were affected by the change from "lands and buildings" of section 154 of the Government of India Act, 1935, to "property" and the grant of exemption to such property from Union taxation. If I had any doubts about the construction of Article 289, this would have served me to show the way. I, however, think that the matter hardly admits of any doubt.

The learned Solicitor-General again and again referred to the dual purpose achieved by the imposition of customs duties, namely, the raising of revenue and the regulation of foreign trade. He associated excise duties with customs in the

1. 9 Haward U.S. 619 at 632; 13 L. Ed. 282.

2. 187 U.S. 281; 47 L. Ed. 178.

same breath and cited the Privy Council case from Canada to argue that if the proposed amendment is declared in either case to be unconstitutional, then, the regulatory part of the same law would fail without being in any way imperilled by Article 289 or anything elsewhere to be found in the Constitution. This argument needs serious consideration.

There can be no doubt that the power of Parliament to regulate foreign trade is plenary and is untrammelled by anything contained in Article 289. A similar assumption may also be made in favour of duties of excise, though the element of regulation may be somewhat weaker there than in the duties of customs. The question, however, is what purpose is the proposed amendment intended to serve? It is a little difficult to dissociate the regulatory aspect from taxation. Even in Australia, where tax laws must deal only with taxation and no other subject, the regulatory aspect of customs duties was adverted to. In the United States of America also, this regulatory aspect of customs duties did play a prominent part. Can, we therefore, say that the combined effect of Entries 83 and 41 of List I would sustain the proposed amendment? If it were a question of regulation being inextricably woven into the tax, I would have paused to consider the matter. I am not expounding a law already made but am giving an opinion on certain questions. These questions definitely refer to the revenue aspect of customs duties. If the law were framed to regulate and even to prohibit the importation, by the State Government in common with others, of certain goods or classes of goods, I would have no hesitation in saying that such a law would not offend the exemption in Article 289. Even if the law was intended to achieve 'both ends', there would be an argument in favour of the Union. But if the advice is sought on the plain question whether the goods of the States can be taxed to raise revenue, the answer is equally plain that it is not permissible except in the circumstances already mentioned respectively in the two sub-sections which are sought to be amended. Section 20 of the Sea Customs Act, and section 3 of the Central Excises and Salt Act, do not pretend to regulate external trade in the one case and production and manufacture, in the other. They are provisions for raising revenue in much the traditional English way. Whatever little pretence there might be is shed completely by the proposed amendment which, to borrow once again from Mr. Justice Douglas, is a "measure designed to put the States on the tax collectors' list". In these circumstances, I answer the question in respect of customs duties without adverting to Entry 41 of the Union list. It is argued that the States would import goods not only free but also freely and, thus, lose valuable exchange. But the question can only be answered as posed and not on the basis of horrible imaginings. It can be argued with equal force that the State Governments may be expected to evince a sane attitude towards our finances.

In so far as excise duties are concerned, no question of regulation of trade or of production or of manufacture can really arise except in certain rare circumstances. Much of this power of regulation of production and manufacture (except in respect of certain essential commodities mentioned in No. 33 of List III and those specially mentioned in List I) belongs to the States. In Entry No. 84, we are concerned with tobacco and other goods except alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics. If regulation can serve the purpose, power will have first to be found either in List I or List III. But if it were a case of pure taxation, then, the excise duty is laid on goods in much the same way as customs. We cannot treat the observations of Judges, where they speak of excises as "on production and manufacture", to be as binding as statutes. Other Judges have used other language, like "on goods produced or manufactured". The Central Excise and Salt Act uses the latter, and so do the Lists in the Constitution. There is, therefore, no difference in this respect between excises and customs. The case of excises is simpler and *a fortiori*, because the goods produced in the States by the States for their ordinary functions of Government and not for trade or business, are property of the States and directly within their ownership. If such property is taxed, it is directly hit by Article 289 (1), and the arguments on the analogy of customs have little place. It follows, therefore, that neither customs duties nor excise duties can be levied on goods properly belonging to a State if the goods are

imported or produced not for the purpose of trade or business but for purposes incidental to the ordinary functions of Government. It also follows that the sections of the two Acts as they stand to-day reflect the true position under the Constitution. I may add that if the Union Government desires to put a curb on the excessive importation of goods by the States, the power to regulate external trade is available and it is unaffected by Article 289. A measure designed to achieve regulation by a system of controls, licensing and all such devices, would not be affected by the exemption contained in the Article, but a pure taxing measure, which seeks to tax property used for State or governmental purposes, is within the exemption.

My answers to the questions are :

(1) The provisions of Article 289 of the Constitution preclude the Union from imposing, or authorizing the imposition of, customs duties on the import or export of the property of a State used for purposes other than those specified in clause (2) of that Article, if the imposition is to raise revenue but not to regulate external trade.

(2) The provisions of Article 289 of the Constitution of India preclude the Union from imposing, or authorizing the imposition of excise duties on the production or manufacture in India of the property of a State used for purposes other than those specified in clause (2) of that Article.

(3) The answer is in the affirmative.

Rajagopala Ayyangar, J.—I entirely agree with the opinion expressed by my Lord the Chief Justice both as regards the answers to the questions referred to this Court as well as the reasoning on which the same is based. My only justification for venturing to add a few words of my own, is because of my feeling that certain matters on which great stress was laid by learned Counsel appearing for the States, might be dealt with a little more fully.

When the learned Solicitor-General submitted that on a proper construction of Article 289 (1), the immunity from Union taxation in its relation to property was confined to a direct tax on property—and did not extend to indirect taxes—which were not on property but on an incident or an event in relation to property, it was urged by learned Counsel for the States that this was introducing a distinction between direct and indirect taxes which formed no part of our constitutional structure. It is true that no such express distinction has been made by our Constitution, even so, taxes in the shape of duties of customs (including export duties) and excise, particularly when imposed with a view to regulating trade and commerce in so far as such matters are within the competence of Parliament being covered by various Entries in List I, these cannot be called taxes on property; for they are imposts with reference to the movement of property by way of import or export or with reference to the production or manufacture of goods. Therefore, even though our Constitution does not confer or distribute legislative power to tax based on any distinction between direct and indirect taxes, it is wrong to suggest that for construing the exemption in Article 289 (1), the distinction would necessarily be irrelevant. Learned Counsel for the States are perfectly correct in their submission that the Constitution does not distribute legislative power in regard to taxation between the Union and the States on any distinction between direct and indirect taxes as in Canada. In passing, I might observe that even in Australia, there is no distribution of taxing power on such a basis, for while the Commonwealth Parliament has an exclusive power to levy duties of customs and excise (subject to the same having to be uniform) it has power, generally speaking, to impose direct taxes also, provided they do not discriminate, and the States have also a similar power to levy such direct taxes. This however does not by itself eliminate the relevance of the distinction for any particular purpose. That there is a distinction between direct and indirect taxes cannot be disputed and I heard no submission to the contrary. The question is whether that distinction has any materiality for interpreting the meaning of the words "the property of a State not being subject to Union taxation". The question at once arises whether when reference is made to "property" and "its taxation" what is

meant is merely a tax on property as such *i.e.*, on the beneficial ownership by the State of the property or whether it is intended to include a tax which bears merely some relationship to or has some impact on such property. For, in the ultimate analysis, the distinction between a direct and an indirect tax is a distinction based upon the difference in impact, which is also expressed as a distinction based upon its being one not on property but on a taxable event in relation to property. If the taxable event is merely the ownership of the property and the beneficial interest therein, it would be a direct tax, whereas if the connection between the property and the taxpayer is not merely ownership but something else such as a transaction in relation to it, then it would be an indirect tax. The argument therefore that under the Constitution legislative power in relation to taxation is not distributed between the Union and the States on any distinction between direct and indirect taxes as in Canada is not very material and of course not decisive on the question under consideration by us.

It was strenuously urged on behalf of the States that if Article 289 (1) were construed in the manner suggested by the Union, *i.e.*, confining the immunity to direct taxes on property as distinct from taxes on property which merely impinged on or had an impact on property, the States could derive no benefit at all from the provision, because the Union Parliament had no legislative competence under the Entries in the Union List to impose, any direct taxes on property and that if some meaning and content has to be given to the exemption it would only be if its scope were to be held to extend to indirect taxes on property such as excise duty and duties of customs. The learned Solicitor-General submitted that even on the construction which he desired us to adopt there would be scope for the operation of the immunity because the exemption might very well have been framed in view of the possible direct taxation on certain forms of property under Entry 97 of the Union List, read with Article 248, though such taxes had not yet been imposed. His further argument was that the exemption might be capable of being invoked in cases where any State owned property in the Union Territories, for in such a situation the Union Government would have under Article 246 (4) power to legislate on the Items enumerated in the State List and thus levy direct taxes on property. On the other side, it was urged that it would not be reasonable to construe the words as having some meaning by reference to such unlikely eventualities, but that it would be proper to attribute to the Constitution-makers an intention to make provision for the usual and the normal.

I must say that the submissions of the learned Solicitor General are not without force. That apart, I consider that the history of this clause should be sufficient to preclude an argument of the type urged for the States having any great or decisive validity. It is common ground that Article 289 (1) was taken over from section 155 (1) of the Government of India Act, 1935, with however a variation to which I shall advert. In that earlier statute, that section ran :

"Subject as hereinafter provided, the Government of a Province shall not be liable to Federal taxation in respect of lands or buildings situate in British India or income accruing or arising or received in British India."

The only change which is material which this section has undergone is the substitution of the word 'property' for the words "lands and buildings", thus extending the immunity not only to immovable property of the type specified but to other forms of property, including movable property as well. The distribution of legislative power in regard to taxation under the Government of India Act in the field relevant to the present context was identical with that which is found in the Constitution. Then as now, there was no power in the Central Legislature to levy any direct taxes on lands and buildings, besides there being no Entry like 97 in the Union List, the residuary power remaining after the distribution in the three Lists being vested in the Governor-General for allocation under section 104. It would have been impossible to find any scope for the operation of this exemption under the scheme of distribution of taxing power under the Government of India Act except possibly on some such line as suggested by the learned Solicitor-General. The fact therefore

that if one had regard merely to the distribution of taxing power between the Centre and the Provinces there was no scope for imparting a wider meaning to the expression "taxes on lands and buildings" appears to me to support the view that the circumstance that direct taxes on property are not within Union Legislative power is not by itself a ground for reading the exemption from taxation as necessarily having any particular or a wider connotation.

The next question is whether the inclusion of property other than "lands and buildings" in the Article by itself brings within the immunity taxation not merely of the property itself but on some incident or event in relation to property such as production or manufacture, import or export (to refer to the incidents which are relevant to the context) or does the Article contemplate the same type of taxes in relation to movable property as were within the exemption under the Government of India Act in regard to "lands and buildings". In other words, just as in the case of "lands and buildings" under the Government of India Act, 1935, is the type of taxation of other species of property now brought in one which is direct and which arises from the mere ownership of such property or does it include a tax levied not on the property itself but on an incident or event in relation to it? The analogy of the immunity from direct taxes on "lands and buildings" which formed the feature of the exemption in regard to "property" under the Government of India Act, 1935, would appear to favour the view that it is also a direct taxation in relation to the other forms of property that was intended to be brought within Article 289 (1). Of course, this view could be over-borne by sufficient reason pointing the other way.

It was in this context that a reference was made to the use of the expression "taxation" in Article 289, a term which has been defined in Article 366 (28) thus :—

"366. In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(28) "Taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly."

There is no doubt that if this definition were applied and every "tax, duty or impost" were within the scope of the exemption, the submissions made on behalf of the States would be formidable. A subsidiary and related point was also made that the expression "taxation" occurs only in Article 289 and that if the width of the definition in Article 366 (28) is not held to be applicable to understand the content of that word in Article 289, the definition itself would be rendered wholly unmeaning. Before considering these arguments it is necessary to advert to some matters. It is true that the expression "taxation" occurs only in Article 289 (1) but it is also to be noted that the definition of the term "taxation" in Article 366 has been bodily taken from section 311 (2) of the Government of India Act, 1935. Just as under the Constitution the word "taxation" also occurs only once in the Government of India Act, 1935, viz., in section 155 (1) corresponding to Article 289 (1). The definition, it would be seen, applies to define not merely the word "taxation" but also to the grammatical variations of that expression—for instance "taxes". In the circumstances the only question is whether in the context in which the word occurs having regard to the antecedent history and the form of the provision and to the other provisions of the Constitution there is justification for the word being understood as meaning something less than the full width of which it is capable under the definition.

In this connection it would be pertinent to refer to the terms of Article 285 in which the corresponding immunity of the Union from State taxation is provided. That Article runs :—

285. "(1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any Authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any Authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

In regard to this provision there are two matters to which attention might be directed. The first of them is the use of the expression "all" in clause (1)—(taken from the corresponding section 154 (1) of the Government of India Act, 1935)—which is absent from Article 289 (1). It is manifest that some significance has to be attached to this variation. If the definition of the word "taxes" in Article 366 (28) were applied to that word in Article 285 (1), it would be apparent that the word "all" would be wholly superfluous and otiose, as the definition itself,—and that is the contention urged before us on behalf of the States—embraces all and every tax. This would suggest that it would not be wrong to take the view that the Constitution-makers felt that notwithstanding the definition of "taxes" in Article 366 (28), it might not always have that width of connotation, so that it was necessary to affirm and if need be supplement its width by the addition of the word "all". The other matter is this. If the definition of "taxes" were read into Article 285 and the Article read literally, it would be seen that property of which the Union was the owner would be entitled to the exemption, whether or not the beneficial occupation and use of the property was in the Union. In other words, the literal reading of the Article would bring within the exemption a tax on a private occupier of Union land—even when imposed on the beneficial interest of such occupier.

Section 125 of the British North America Act, 1867 ran :

"No lands or property belonging to Canada shall be liable to taxation (Provincial)".

A lessee of Dominion Crown lands taken on lease for grazing purposes was assessed to land tax under an enactment of Saskatchewan in respect of the lessee's interest in the lands. The Dominion challenged the validity of the imposition on the ground of the land itself being within the immunity conferred by section 125. Rejecting this contention Viscount Haldane speaking for the Judicial Committee said :

"..... although the appellant is sought to be taxed in respect of his occupation of land, the fee of which is in the Crown, the operation of the Statute imposing the tax is limited to the appellant's own interest", *Smith v. Vermillion Hills*¹.

My object in referring to these observations is that provisions of this sort cannot always be read literally and that the object of the framers as disclosed by the general scheme of distribution of powers has to be borne in mind to arrive at their proper construction. It is in this context that the intimate correlation between the exclusive legislative power of the Union in regard to "trade and commerce with foreign countries", and related to it, "import and export across customs frontiers" and the duties with which we are now concerned and particularly import and export duties on movements across the customs frontier assume crucial importance ; and pose the question whether this power confided to the Union was intended to be broken into by every component State importing its requirements free of duty.

There was one other further submission made to us by learned Counsel for the States which requires some detailed examination and this was based upon the impact of clause (2) of Article 289 on the import of clause (1). The argument was this : The *non-obstante* clause with which clause (2) opens should be taken to indicate that but for that clause, the exemption would be operative so as to deprive the Union of the power to levy tax in the converse circumstance, in other words, that but for clause (2) even where the State was engaged in a trading activity it would be entitled to claim exemption from Union taxes. It was therefore submitted that light could be gathered from the content of clause (2) on the types of taxation from which exemption was granted under clause (1) or in other words for determining the ambit of the immunity covered by clause (1). The argument proceeded : Clause (2) permits the Union to impose the following taxes notwithstanding the blanket exemption granted by clause (1). These taxes are: (1) A tax in respect of a trade or business of any kind carried on by or on behalf of the State. The taxes leviable in respect of a trade or business would be, having regard to the Entries in the Union List, (a) income-tax (Item 82), (b) possibly corporation tax (Item 85) where the State carries on business through a State owned or State controlled corporation, (c) taxes on the capital value

1. L.R. (1916) 2 A.C. 569 at 574.

of assets of companies (Item 86) in cases where the State carries on business through a State owned corporation ; (2) taxes in respect of operations connected with a trade or business. These might include a tax on freights, sales tax, and it was added duties of customs and duties of excise ; (3) taxes in respect of property used or occupied in connection with such a trade or business or any income accruing or arising in connection therewith. It was strongly pressed upon us that not merely direct taxes on property and direct taxes on income, but other types of taxes which were incidental to the "operations connected" with a trade or business (and it was suggested that customs and excise duties were such) could be imposed by the Union upon the States in cases where the latter was carrying on a trade or business. It necessarily followed, it was urged, that if these were not used for a trade or business, the taxes would fall within the scope of the exemption under Article 289 (1). In other words, the argument was that as there was a limited power in Parliament to impose taxation on States or on those acting on behalf of the States it necessarily connoted that in cases not covered by clause (2), that is in cases where it was not connected with a trade or business the exemption under clause (1) would operate.

The precise relationship between clauses (2) and (1) and the question whether the former was a proviso properly so called which had been carved out of the main provision of clause (1) and which but for such carving out would be within clause (1) was the subject of considerable debate before us, but, I consider that it is not necessary to deal with this rather technical point for in my view the history of clause (2) throws considerable light on its significance and place in the scheme of tax exemption. At the Imperial Economic Conference of 1923 a resolution was adopted to the effect that the Parliaments of Great Britain, the Dominions and India should be invited to enact a declaration that the general and particular provisions of their respective Acts imposing taxation might be made to apply to any commercial or industrial enterprises carried on by any other such Government in all respects as if it were carried on by or on behalf of a subject of the British Crown.

This resolution drew a distinction between the trading and business activities of the several constituent units owing allegiance to the Crown of England and their governmental activities. In pursuance of this resolution the Imperial Parliament enacted section 25 in the Finance Act of 1925 (15 and 16 George V, c. 36) which read, to quote the material words :

" 25. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions which is outside Great Britain and Northern Ireland, that Government shall, in respect of the trade or business and of all operations in connection therewith, all property occupied in Great Britain or Northern Ireland and all goods owned in Great Britain or Northern Ireland for the purposes thereof and all income arising in connection therewith, be liable, in the same manner as in the like case any other person would be, to all taxation for the time being in force in Great Britain or Northern Ireland.

(2)

(3) Nothing in this section shall—

(a) affect the immunity of any such Government as aforesaid from taxation in respect of any income or property to which sub-section (1) of this section does not apply ; or

(b)

A similar provision was enacted in India in the Government Trading Taxation Act, 1926 (Act III of 1926). Its Preamble recited :

" WHEREAS it is expedient to determine the liability to taxation for the time being in force in British India of the Government of any part of His Majesty's Dominions, exclusive of British India, in respect of any trade or business carried on by or on behalf of such Government; it is hereby enacted as follows :—"

The operative provision was section 2 and it ran :—

" 2. (1) Where a trade or business of any kind is carried on by or on behalf of the Government of any part of His Majesty's Dominions, exclusive of British India, that Government shall, in respect of the trade or business and of all operations connected therewith, all property occupied in British India and all goods owned in British India for the purposes thereof, and all income arising in connection therewith, be liable—

(a) to taxation under the Indian Income-tax Act, 1922, in the same manner and to the same extent as in the like case a company would be liable ;

(b) to all other taxation for the time being in force in British India in the same manner as in the like case any other person would be liable.

(2) For the purposes of the levy and collection of income-tax under the Indian Income-tax, Act, 1922, in accordance with the provisions of sub-section (1), any Government to which that sub-section applies shall be deemed to be a company within the meaning of that Act, and the provisions of the Act shall apply accordingly.

(3) In this section the expression "His Majesty's Dominions" includes any territory which is under His Majesty's protection or in respect of which a mandate is being exercised by the Government of any part of His Majesty's Dominions."

This, it would be seen, applied to a foreign Government carrying on a trade or business or owning property or using property within British India. The Act has been adopted subsequently to bring it into line with the constitutional changes that have taken place since 1926, but it is unnecessary to refer to them. Proviso (a) to sub-section (1) of section 155 enacted the exemption in the same terms as in the Act of 1926 in favour of the Provinces under the Government of India Act, 1935. This bodily incorporation was done without any reference to the distribution of legislative powers effected by Schedule 7 of the Government of India Act.

This being the historical origin of this provision, it is not easy to relate it to the exemption in Article 289 (1) or to construe the exemption with its aid. Bearing in mind this antecedent history it appears to me that it would not be proper to read the scope of the saving in favour of the Union in clause (2) as reflecting on the scope of Article 289 (1).

There is also another angle from which the relevance of clause (2) to the construction of clause (1) of Article 289 might be tested. One of the more serious arguments put forward on behalf of the States to which I have adverted was that if the expression 'taxes' in relation to the exemption of property from tax were confined to direct taxes on property the exemption would be unmeaning, as such taxes could not be imposed by the Union. Now, let me take the taxes specified in Article 289(2). They include, for instance, taxes on "property used or occupied for the purpose of such trade or business". A tax on the use of property or on the property itself which is occupied for the purpose of trade would obviously be a direct tax on property which *ex-concessis* the Central Legislature under the Government of India Act and Parliament under the Constitution are incompetent to impose. It is not the contention of the States that the Centre has such a power to levy a tax on occupation or use of property where it is in connection with a trade or business. This would at least show that it is not justifiable to imply from clause (2) that but for that provision Parliament would be entitled to impose such a tax.

The other points urged have been dealt with in the opinion of my Lord the Chief Justice and I do not propose to cover the same ground. I concur in the view that the questions referred to this Court for its opinion should be answered as they have been by the Chief Justice.

V.B.

Reference answered accordingly.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—B.P. SINHA, Chief Justice, S. J. IMAM, K. SUBBA RAO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

Kharak Singh

.. Petitioner*

v.

The State of U.P. and others

.. Respondents.

U. P. Police Regulations, Chapter XX, Regulation 236—Constitutional validity—Regulation 236, clauses (a), (c), (d) and (e)—Shadowing suspects—No violation of Article 19 (1) (d) or Article 22—Regulation 236 (b)—Domestic visits at night—Article 22 of the Constitution infringed.

Constitution of India, 1950, Article 19 and Article 22—Fundamental rights under—Scope and content of—'Life' and 'Personal liberty'—What constitute—Constitution of India, 1950, Article 32—Violation of fundamental right—Petition under—Existence of alternative remedy—If a bar.

By majority: Secret picketing of the houses of suspects is to ascertain the identity of the person or persons who visit the house of the suspect, so that the Police might have a record of the nature of

the activities in which the suspect is engaged. This, of course, cannot in any material or palpable form affect either the right on the part of the suspect to "move freely" nor can it be held to deprive him of "personal liberty" within Article 21.

"Picketing" is used in clause (a) of Regulation 236 of the U. P. Police Regulations not in the sense of offering resistance to the visitor—physical or otherwise—or even dissuading him, from entering the house of the suspect but merely of watching and keeping a record of the visitors.

Domiciliary visits at night in the context of the provisions in the Regulations are for the purpose of making sure that the suspect is staying at home or whether he has gone out, the latter being presumed in this class of cases, to be with the probable intent of committing a crime.

Having regard to the plain meaning of the words "domiciliary visits", the Police Authorities are authorised to enter the premises of the suspect, knock at the door and have it opened and search it for the purpose of ascertaining his presence in the house. The fact that in any particular instance or even generally they do not exercise to the full the powers which the Regulation vests in them, is wholly irrelevant for determining the validity of the Regulation since if they are so minded they are at liberty to exercise those powers and do those acts without outstepping the limits of their authority under the Regulations.

The right to "move" denotes nothing more than a right of locomotion, and that in the context the adverb "freely" only connote that the freedom to move is without restriction and is absolute, i.e., to move wherever one likes, whenever one likes and however one likes subject to any valid law enacted or made under clause 5. It is manifest that by the knock at the door, or by the man being roused from his sleep, his locomotion is not impeded or prejudiced in any manner.

The knowledge or apprehension that the Police were on the watch for the movements of the suspect, might induce a psychological inhibition against his movements, there is an impairment of the "free" movement guaranteed by sub-clause (d) of Article 19 (1). But the freedom guaranteed by Article 19 (1) (d) has reference to something tangible and physical rather and not to the imperceptible effect on the mind of a person which might guide his action in the matter of his movement or locomotion.

The fact that an act by the State Executive or by a State functionary acting under a pretended authority gives rise to an action at common law or even under a statute and that the injured citizen or person may have redress in the ordinary Courts is wholly immaterial and irrelevant for considering whether such action is an invasion of a fundamental right. An act of the State Executive infringes a guaranteed liberty only when it is not authorised by a valid law or by any law as in this case, and every such illegal act would obviously give rise to a cause of action—civil or criminal at the instance of the injured person for redress. It is wholly erroneous to assume that before the jurisdiction of this Court under Article 32 could be invoked the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of this Court that by State action the fundamental right of a petitioner under Article 32 has been infringed, it is not only the right but the duty of this Court to afford relief to him by passing appropriate orders in that behalf.

"Personal liberty" is used in Article 21 of the Constitution as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19 (1). In other words, while Article 19 (1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprises the residue.

"Life" in the 5th and 14th Amendments of the U. S. Constitution corresponding to Article 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs, his arms and legs, etc. The word 'life' in Article 21 bears the same signification.

An unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man—an ultimate essential of ordered liberty, if not of the very concept of civilisation.

Clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no "Law" on which the same could be justified it must be struck down as unconstitutional.

The actions suggested by clauses (c), (d) and (e) of the Regulation 236 are really details of the shadowing of the history-sheets for the purpose of having a record of their movements and activities and the obtaining information relating to persons with whom they come in contact or associate, with a view to ascertain the nature of their activities.

The freedom guaranteed by Article 19 (1) (d) is not infringed by a watch being kept over the movements of the suspect.

The right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

Per *Subba Rao, J.* (for himself and *Shah, J.*)—The rights under Article 21 and Article 19 are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes

and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19 (2) so far as the attributes covered by Article 19 (1) are concerned.

The right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.

The freedom of movement in clause (d) therefore must be a movement in a free country, *i.e.*, in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. Therefore, the entire Regulation 236 offends also Article 19 (1) (d) of the Constitution.

Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

J.P. Goyal, Advocate, for Petitioner.

K.S. Hajela, Senior Advocate (*C.P. Lal*, Advocate with him), for Respondents.

The Court delivered the following Judgments :

Rajagopala Ayyangar, J. (on behalf of the majority).—This petition under Article 32 of the Constitution challenges the constitutional validity of Chapter XX of the U.P. Police Regulations and the powers conferred upon police officials by its several provisions on the ground that they violate the right guaranteed to citizens by Articles 19 (1) (d) and 21 of the Constitution.

To appreciate the contention raised it is necessary to set out the facts averred on the basis of which the fundamental right of the petitioner is said to be violated, as well as the answers by the respondent-State to these allegations. The petitioner—*Kharak Singh*—was challenged in a case of dacoity in 1941 but was released under section 169, Criminal Procedure Code as there was no evidence against him. On the basis of the accusation made against him he states that the Police have opened a "history-sheet" in regard to him. Regulation 228 which occurs in Chapter XX of the Police Regulation defines "history-sheets" as "the personal records of criminals under surveillance". That Regulation further directs that "history-sheets" should be opened only for persons who are or are likely to become habitual criminals or the aiders or abettors of such criminals. These history-sheets are of two classes: Class A for dacoits, burglars, cattle-thieves, and railway-goods wagon thieves, and Class B for those who are confirmed and professional criminals who commit crimes other than dacoity, burglary, etc., like professional cheats. It is admitted that a history-sheet in Class A has been opened for the petitioner and he is therefore "under surveillance."

The petitioner describes the surveillance to which he has been subjected thus : Frequently the Chaukidar of the village and sometimes Police Constables enter his house, knock and shout at his door, wake him up during the night and thereby disturb his sleep. On a number of occasions they have compelled him to get up from his sleep and accompany them to the Police Station to report his presence there. When the petitioner leaves his village for another village or town, he has to report to the Chaukidar of the village or at the Police Station about his departure. He has to give them information regarding his destination and the period within which he would return. Immediately the Police Station of his destination is contacted by the Police Station of his departure and the former puts him under surveillance in the same way as the latter. There are other allegations made about misuse or abuse of authority by the Chaukidar or the Police Officials but these have been denied and we do not consider them made out for the purposes of the present petition. If the Officials outstep the limits of their authority they would be violating even the instructions given to them, but it looks to us that these excesses of individual Officers which are wholly unauthorised could not be complained of in a petition under Article 32.

In deciding this petition we shall proceed upon the basis that the Officers conformed strictly to the terms of the Regulations in Chapter XX properly construed and discard as exaggerated or not proved the incidents or pieces of conduct on the part of the authorities which are alleged in the petition but which have been denied. As already pointed out it is admitted that a history-sheet has been opened and a record as prescribed by the Regulations maintained for the petitioner and that such action as is required to be taken in respect of history-sheets of Class A into which the petitioner fell under the classification made in Chapter XX of the Police Regulations is being taken in regard to him. It is stated in the counter affidavit that the Police keep a confidential watch over the movements of the petitioner as directed by the Regulations in the interest of the general public and for the maintenance of public order.

Before entering on the details of these Regulations it is necessary to point out that the defence of the State in support of their validity is two-fold : (1) that the impugned Regulations do not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution which are invoked by the petitioner, and (2) that even if they were, they have been framed "in the interests of the general public and public order" and to enable the Police to discharge its duties in a more efficient manner and were therefore "reasonable restrictions" on that freedom. Pausing here it is necessary to point out that the second point urged is without any legal basis for if the petitioner were able to establish that the impugned Regulations constitute an infringement of any of the freedoms guaranteed to him by the Constitution then the only manner in which this violation of the fundamental right could be defended would be by justifying the impugned action by reference to a valid law, i.e., be it a statute, a statutory rule or a statutory regulation. Though learned Counsel for the respondent started by attempting such a justification by invoking section 12 of the Indian Police Act he gave this up and conceded that the Regulations contained in Chapter XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the Police Officers. They would not therefore be "a law" which the State is entitled to make under the relevant clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19 (1), nor would the same be "a procedure established by law" within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the State is found to infringe any of the freedoms guaranteed to the petitioner the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the State from taking action under the Regulations.

There is one other matter which requires to be clarified even at this stage. A considerable part of the argument addressed to us on behalf of the respondent was directed to showing that the Regulations were reasonable and were directed only against those who were on proper grounds suspected to be of proved anti-social habits and tendencies and on whom it was necessary to impose some restraints for the protection of society. We entirely agree that if the Regulations had any statutory basis and were a "law" within Article 13 (3), the consideration mentioned might have an overwhelming and even decisive weight in establishing that the classification was rational and that the restrictions were reasonable and designed to preserve public order by suitable preventive action. But not being any such "law", these considerations are out of place and their constitutional validity has to be judged on the same basis as if they were applied against every one including respectable and law-abiding citizens not being or even suspected of being, potential dangers to public order.

The sole question for determination therefore is whether "surveillance" under the impugned Chapter XX of the U.P. Police Regulations constitutes an infringement of any of a citizen's fundamental rights guaranteed by Part III of the Constitution. The particular Regulation which for all practical purposes defines "surveillance" is Regulation 236 which reads :

"without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures :

- (a) Secret picketing of the house or approaches to the houses of suspects ;
- (b) domiciliary visits at night ;
- (c) through periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation ;
- (d) the reporting by Constables and Chaukidars of movements and absences from home ;
- (e) the verification of movements and absences by means of inquiry slips ;
- (f) the collection and record on a history-sheet of all information bearing on conduct."

Regulation 237 provides that all "history-sheet men" of Class A (under which the petitioner falls) "starred" and "unstarred", would be subject to all these measures of surveillance. The other Regulations in the Chapter merely elaborate several items of action which make up the "surveillance" or the shadowing but we consider that nothing material turns on the provisions or their terms.

Learned Counsel for the petitioner urged that the acts set out in clauses (a) to (f) of Regulation 236 infringed the freedom guaranteed by Article 19 (1) (d) "to move freely throughout the territory of India" and also that guaranteeing "personal liberty" in Article 21 which runs :

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

We shall now consider each of these clauses of Regulation 236 in relation to the "freedoms" which it is said they violate :

(a) *Secret picketing of the houses of suspects.*—

It is obvious that the secrecy here referred to is secrecy from the suspect ; in other words its purpose is to ascertain the identity of the person or persons who visit the house of the suspect, so that the Police might have a record of the nature of the activities in which the suspect is engaged. This, of course, cannot in any material or palpable form affect either the right on the part of the suspect to "move freely" nor can it be held to deprive him of his "personal liberty" within Article 21. It was submitted that if the suspect does come to know that his house is being subjected to picketing, that might affect his inclination to move about or that in any event it would prejudice his "personal liberty". We consider that there is no substance in this argument. In dealing with a fundamental right such as the right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the Constitution-makers intended to protect or protect mere personal sensitiveness. It was then suggested that such picketing might have a tendency to prevent, if not actually preventing friends of the suspect from going to his house and would thus interfere with his right "to form associations" guaranteed by Article 19 (1) (c). We do not consider it necessary to examine closely and determine finally the precise scope of the "freedom of association" and particularly whether it would be attracted to a case of the type now under discussion, since we are satisfied that "picketing" is used in clause (a) of this Regulation not in the sense of offering resistance to the visitor—physical or otherwise—or even dissuading him, from entering the house of the suspect but merely of watching and keeping a record of the visitors. This interpretation we have reached (a) on the basis of the provisions contained in the later Regulations in the Chapter, and (b) because more than even the express provisions, the very purpose of the watching and the secrecy, which is enjoined would be totally frustrated if those whose duty it is to watch contacted the visitors, made their presence or identity known and tried to persuade them to any desired course of action.

(b) *Domiciliary visits at night.*—

"Domiciliary visit" is defined in the Oxford English Dictionary as "Visit to a private dwelling, by official persons, in order to search or inspect it." Webster's

Third New International Dictionary defines the word as "Visit to a private dwelling (as for searching it) under authority." The definition in Chambers Twentieth Century Dictionary is almost identical—"Visit under authority, to a private house for the purpose of searching it." These visits in the context of the provisions in the Regulations are for the purpose of making sure that the suspect is staying at home or whether he has gone out, the latter being presumed in this class of cases, to be with the probable intent of committing a crime. It was urged for the respondent that the allegations in the petition regarding the manner in which "domiciliary visits" are conducted, *viz.*, that the Policeman or Chaukidar enters the house and knocks at the door at night and after awakening the suspect makes sure of his presence at his home had been denied in the counter-affidavit and was not true, and that the Policemen as a rule merely watch from outside the suspect's house and make enquiries from third persons regarding his presence or whereabouts. We do not consider that this submission affords any answer to the challenge to the constitutionality of the provision. In the first place, it is clear that having regard to the plain meaning of the words "domiciliary visits", the Police Authorities are authorised to enter the premises of the suspect, knock at the door and have it opened and search it for the purpose of ascertaining his presence in the house. The fact that in any particular instance or even generally they do not exercise to the full the power which the Regulation vests in them, is wholly irrelevant for determining the validity of the Regulation since if they are so minded they are at liberty to exercise those powers and do those acts without outstepping the limits of their authority under the Regulations.

Secondly, we are, by no means, satisfied that having regard to the terms of Regulation 236 (b) the allegation by the petitioner that Police Constables knock at his doors and wake him up during the night in the process of assuring themselves of his presence at home is entirely false, even if the other allegations regarding his being compelled to accompany the Constables during the night to the Police Station be discarded as mere embellishment.

The question that has next to be considered is whether the intrusion into the residence of a citizen and the knocking at his door with the disturbance to his sleep and ordinary comfort which such action must necessarily involve, constitute a violation of the freedom guaranteed by Article 19 (1) (d) or "a deprivation" of the "personal liberty" guaranteed by Article 21. Taking first Article 19 (1) (d) the "freedom" here guaranteed is a right "to move freely" throughout the territory of India. Omitting as immaterial for the present purpose the last words defining the geographical area of the guaranteed movement, we agree that the right to "move" denotes nothing more than a right of locomotion, and that in the context the adverb "freely" would only connote that the freedom to move is without restriction and is absolute, *i.e.*, to move wherever one likes, whenever one likes and however one likes subject to any valid law enacted or made under clause (5). It is manifest that by the knock at the door, or by the man being roused from his sleep, his locomotion is not impeded or prejudiced in any manner. Learned Counsel suggested that the knowledge or apprehension that the Police were on the watch for the movements of the suspect, might induce a psychological inhibition against his movements but, as already pointed out, we are unable to accept the argument that for this reason there is an impairment of the "free" movement guaranteed by sub-clause (d). We are not persuaded that Counsel is right in the suggestion that this would have any effect even on the mind of the suspect and even if in any particular case it had the effect of diverting or impeding his movement, we are clear that the freedom guaranteed by Article 19 (1) (d) has reference to something tangible and physical rather and not to the imponderable effect on the mind of a person which might guide his action in the matter of his movement or locomotion.

The content of Article 21 next calls for examination. Explaining the scope of the words "life" and "liberty" which occurs in the 5th and 14th Amendments to the U.S. Constitution reading "No person . . . shall be deprived of life, liberty or property without due process of law", to quote the material words, on which Article 21 is largely modelled, Field, J. observed:

"By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world. By the term liberty, as used in the provision something more is meant than mere freedom from physical restraint or the bounds of a prison."

It is true that in Article 21, as contrasted with the 4th and 14th Amendments in the U.S., the word "liberty" is qualified by the word "personal" and therefore its content is narrower. But the qualifying adjective has been employed in order to avoid overlapping between those elements or incidents of "liberty" like freedom of speech, or freedom of movement, etc. already dealt with in Article 19 (1) and the "liberty" guaranteed by Article 21—and particularly in the context of the difference between the permissible restraints or restrictions which might be imposed by sub-clauses (2) to (6) of the Article on the several species of liberty dealt with in the several clauses of Article 19 (1). In view of the very limited nature of the question before us it is unnecessary to pause to consider either the precise relationship between the "liberties" in Article 19 (1) (a) and (d) on the one hand and that in Article 21 on the other, or the content and significance of the words "procedure established by law" in the latter Article, both of which were the subject of elaborate consideration by this Court in *A. K. Gopalan v. State of Madras*¹. In fact, in *Gopalan's case*¹ there was unanimity of opinion on the question that if there was no enacted law, the freedom guaranteed by Article 21 would be violated, though the learned Judges differed as to whether any and every enacted law satisfied the description or requirements of "a procedure established by law".

Before proceeding further a submission on behalf of the respondent requires notice. It was said that if the act of the police involved a trespass to property, i.e., the trespass involved in the act of the Police Official walking into the premises of the petitioner and knocking at the door, as well as the disturbance caused to him, might give rise to claims in tort, since the action was not authorised by law and that for these breaches of the petitioner's rights damages might be claimed and recovered from the tortfeasor, but that the same could not constitute an infraction of a fundamental right. Similarly it was urged that the petitioner or persons against whom such action was taken might be within their rights in ejecting the trespasser and even use force to effectuate that purpose, but that for what was a mere tort of trespass or nuisance the jurisdiction of this Court under Article 32 could not be invoked. These submissions proceed on a basic fallacy. The fact that an act by the State Executive or by a State functionary acting under a pretended authority gives rise to an action at common law or even under a statute and that the injured citizen or person may have redress in the ordinary Courts is wholly immaterial and, we would add, irrelevant for considering whether such action is an invasion of a fundamental right. An act of the State Executive infringes a guaranteed liberty only when it is not authorised by a valid law or by any law as in this case, and every such illegal act would obviously give rise to a cause of action—civil or criminal at the instance of the injured person for redress. It is wholly erroneous to assume that before the jurisdiction of this Court under Article 32 could be invoked the applicant must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of this Court that by State action the fundamental right of a petitioner under Article 32 has been infringed, it is not only the right but the duty of this Court to afford relief to him by passing appropriate orders in that behalf.

We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Article 21. Having regard to the terms of Article 19 (1) (d), we must take it that that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more

1. (1950) 2 M.L.J. 42 : (1950) S.C.J. 174 : (1950) S.C.R. 88.

than freedom from physical restraint or freedom from confinement within the bounds of a prison ; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19 (1). In other words, while Article 19 (1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprises the residue. We have already extracted a passage from the judgment of Field, J., in *Munn v. Illinois*¹, where the learned Judge pointed out that "life" in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs—his arms and legs, etc. We do not entertain any doubt that the word "life" in Article 21 bears the same signification. Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the Preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in *Wolf v. Colorado*² :

"The security of one's privacy against arbitrary intrusion by the police.....is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.....We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment."

Murphy, J., considered that such invasion was against "the very essence of a scheme of ordered liberty".

It is true that in the decision of the U.S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads :

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

and that our Constitution does not in terms confer any like constitutional guarantees. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man—an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that "every man's house is his castle" and in *Semayne's case*³, where this was applied, it was stated that

"the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose".

We are not unmindful of the fact that *Semayne's case*³ was concerned with the law relating to executions in England, but the passage extracted has a validity

1. 94 U.S. 113 at p. 142.

2. 338 U.S. 25,

3. 5 Coke 91 ; 1 Sm.L.C. (13th Edn.) 104 at p. 105.

quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

In our view clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no "Law" on which the same could be justified it must be struck down as unconstitutional.

Clauses (c), (d) and (e) may be dealt with together. The actions suggested by these clauses are really details of the shadowing of the history-sheets for the purpose of having a record of their movements and activities and the obtaining information relating to persons with whom they come in contact or associate, with a view to ascertain the nature of their activities. It was urged by learned Counsel that the shadowing of a person obstructed his free movement or in any event was an impediment to his free movement within Article 19 (1) (d) of the Constitution. The argument that the freedom there postulated was not confined to a mere physical restraint hampering movement but that the term "freely" used in the Article connoted a wider freedom transcending mere physical restraints, and included psychological inhibitions we have already considered and rejected. A few minor matters arising in connection with these clauses might now be noticed. For instance, clauses (d) and (e) refer to the reporting of the movements of the suspect and his absence from his home and the verification of movements and absences by means of enquiries. The enquiry for the purpose of ascertaining the movements of the suspect might conceivably take one of two forms: (1) an enquiry of the suspect himself, and (2) of others. When an enquiry is made of the suspect himself, the question mooted was that some fundamental right of his was violated. The answer must be in the negative because the suspect has the liberty to answer or not to answer the question for *ex concessis* there is no law on the point involving him in any liability—civil or criminal—if he refused to answer or remained silent. Does then the fact that an enquiry is made as regards the movements of the suspect and the facts ascertained by such enquiry are verified and the true facts sifted constitute an infringement of the freedom to move? Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Article 19 (1) (d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

The result therefore is that the petition succeeds in part and Regulation 236 (b) which authorises "domiciliary visits" is struck down as unconstitutional. The petitioner would be entitled to the issue of a writ of *mandamus* directing the respondent not to continue domiciliary visits. The rest of the petition fails and is dismissed. There will be no order as to costs.

Subba Rao, J. (for himself and *Shah, J.*).—We have had the advantage of perusing the judgment prepared by our learned brother Rajagopala Ayyangar, J. We agree with him that Regulation 236 (b) is unconstitutional, but we would go further and hold that the entire Regulation is unconstitutional on the ground that it infringes both Article 19 (1) (d) and Article 21 of the Constitution.

This petition raises a question of far-reaching importance, namely, a right of a citizen of India to lead a free life subject to social control imposed by valid law. The fact that the question has been raised at the instance of an alleged disreputable character shall not be allowed to deflect our perspective. If the police could do what they did to the petitioner, they could also do the same to an honest and law-abiding citizen.

Let us at the outset clear the ground. We are not concerned here with a law imposing restrictions on a bad character, for admittedly there is no such law. Therefore, the petitioner's fundamental right, if any has to be judged on the basis that there is no such law. To state it differently, what fundamental right of the petitioner has been infringed by the acts of the police? If he has any fundamental right which has been infringed by such acts, he would be entitled to a relief straightaway, for the State could not justify it on the basis of any law made by the appropriate Legislature or the Rules made thereunder.

The petitioner in his affidavit attributes to the respondents the following acts:—

"Frequently the Chaukidar of the village and sometimes Police Constables awake him in the night and thereby disturb his sleep. They shout at his door and sometimes enter inside his house. On a number of occasions they compel him to get up from his sleep and accompany them to the Police Station, Civil Lines, Meerut, (which is three miles from the petitioner's village) to report his presence there. When the petitioner leaves his village for another village or town, he has to report to the Chaukidar of the village or at the Police Station about his departure. He has to give information regarding his destination and the period within which he will return. Immediately the Police Station of his destination is contacted by the Police Station of his departure and the former puts him under surveillance in the same way as the latter does."

"It may be pointed out that the Chaukidar of the village keeps a record of the presence and absence of the petitioner in a register known as Chaukidar's Crime Record Book."

"All the entries in this book are made behind the petitioner's back and he is never given any opportunity of examining or inspecting these records."

There are other allegations made about the misuse or abuse of authority by the Chaukidar or the Police Officials.

In the counter-affidavit filed by the respondents it is admitted that the petitioner is under the surveillance of the police, but the allegations of abuse of powers are denied. A perusal of the affidavit and the counter-affidavit shows that the petitioner tries to inflate the acts of interference by the police in his life, while the respondents attempt to deflate it to the minimum. In the circumstances we would accept only such of the allegations made by the petitioner in his affidavit which are in conformity with the act of surveillance described by Regulation 236 of Chapter XX of the U.P. Police Regulations. The said Regulation reads :

"Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures :

- (a) Secret picketing of the house or approaches to the houses of suspects ;
- (b) domiciliary visits at night ;
- (c) through periodical inquiries by officers not below the rank of Sub-Inspector into repute, habits, associations, income, expenses and occupation ;
- (d) the reporting by Constables and Chaukidars of movements and absences from home ;
- (e) the verification of movements and absences by means of inquiry slips ;
- (f) the collection and record on a history-sheet of all information bearing on conduct."

Regulation 237 provides that all "history-sheet men" of Class A, "starred" and "unstarred", would be subject to all the said measures of surveillance. It is common case that the petitioner is a Class A history-sheeter and, therefore, he is subject to the entire field of surveillance.

Before we construe the scope of the said Regulation, it will be necessary to ascertain the meaning of some technical words used therein. What does the expression "surveillance" mean? Surveillance conveys the idea of supervision and close observance. The person under surveillance is not permitted to go about unwatched. Clause (a) uses the expression "secret-picketing". What does the expression mean? Picketing has many meanings. A man or a party may be stationed by trade union at a workshop to deter would-be workers during strike. Social workers may stand at a liquor shop to intercept people going to the shop to buy liquor and prevail upon them to desist from doing so. Small body of troops may be sent out as a picket to watch for the enemy. The word "picketing" may,

therefore, mean posting of certain policemen near the house or approaches of the house of a person to watch his movements and to prevent people going to his house or having association with him. But the adjective "secret" qualifies the word "picketing" and to some extent limits its meaning. What does the expression "secret" mean? Secret from whom? Does it mean keeping secret from the man watched as well as from the people who go to his house? Though the expression is not clear, we will assume that secret-picketing only means posting of the police at the house of a person to watch his movements and those of his associates without their knowledge. But in practice, whatever may have been the intention of the authorities concerned, it is well nigh impossible to keep it secret. It will be known to everybody including the person watched.

The next expression is "domiciliary visit" at night. 'Domiciliary' means "of a dwelling place". A domiciliary visit is a visit of officials to search or inspect a private house.

Having ascertained the meaning of the said three expressions, let us see the operation of the Regulation and its impact on a person like the petitioner who comes within its scope. Policemen were posted near his house to watch his movements and those of his friends or associates who went to his house. They entered his house in the night and woke him up to ascertain whether he was in the house and thereby disturbed his sleep and rest. The officials not below the rank of Sub-Inspector made inquiries obviously from others as regards his habits, associations, income, expenses and the occupation, i.e., they got information from others as regards his entire way of life. The Constables and the Chaukidars traced his movements, shadowed him and made reports to the superiors. In short, his entire life was made an open-book and every activity of his was closely observed and followed. It is impossible to accept the contention that this could have been made without the knowledge of the petitioner or his friends, associates and others in the locality. The attempt to dissect the act of surveillance into its various ramifications is not realistic. Clauses (a) to (f) are the measures adopted for the purpose of supervision or close observation of his movements and are, therefore, parts of surveillance. The question is whether such a surveillance infringes any of the petitioner's fundamental rights.

Learned Counsel for the petitioner contends that by the said act of surveillance the petitioner's fundamental rights under clauses (a) and (d) of Article 19 (1) and Article 21 are infringed. The said Articles read :—

Article 21 : No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 19 (1) : All citizens shall have the right—

(a) to freedom of speech and expression ;

(b) to move freely throughout the territory of India.

At this stage it will be convenient to ascertain the scope of the said two provisions and their relation *inter se*, in the context of the question raised. Both of them are distinct fundamental rights. No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action ; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19 (2) so far as the attributes covered by Article 19 (1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19 (2) of the Constitution.

But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Article 19 (1) (d) and Article 21 are infringed by the State.

Now let us consider the scope of Article 21. The expression "life" used in that Article cannot be confined only to the taking away of life; *i.e.*, causing death. In *Munn v. Illinois*¹, Field, J., defined "life" in the following words :

"Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

The expression "liberty" is given a very wide meaning in America. It takes in all the freedoms. In *Bolling v. Sharpe*², the Supreme Court of America observed that the said expression was not confined to mere freedom from bodily restraint and that liberty under law extended to the full range of conduct which the individual was free to pursue. But this absolute right to liberty was regulated to protect other social interests by the State exercising its power such as police power, the power of eminent domain, the power of taxation, etc. The proper exercise of the power which is called the "due process of law" is controlled by the Supreme Court of America. In India the word "liberty" has been qualified by the word "personal" indicating thereby that it is confined only to the liberty of the person. The other aspects of the liberty have been provided for in other Articles of the Constitution. The concept of personal liberty has been succinctly explained by Dicey in his book on Constitutional Law, 9th Edition. The learned author describes the ambit of that right at pages 207-208 thus :

"The right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."

Blackstone in his Commentaries on the Laws of England, Book 1, at page 134 observes :—

"Personal liberty includes 'the power to locomotion of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law'."

In *A. K. Gopalan's case*³, it is described to mean liberty relating to or concerning the person or body of the individual; and personal liberty in this sense is the antithesis of physical restraint or coercion. The expression is wide enough to take in a right to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected grooves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution, does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter, J., in *Wolf v. Colorado*⁴, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is

1. (1877) 94 U.S. 113.

2. (1954) 347 U.S. 497, 499.

3. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 :

(1950) S.C.R. 88.

4. (1949) 238 U.S. 25.

more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.

This leads us to the second question, namely, whether the petitioner's fundamental right under Article 19 (1) (d) is also infringed. What is the content of the said fundamental right? It is argued for the State that it means only that a person can move physically from one point to another without any restraint. This argument ignores the adverb "freely" in clause (d). If that adverb is not in the clause, there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom. Mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automaton. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in clause (d) therefore must be a movement in a free country, *i.e.*, in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. We would, therefore, hold that the entire Regulation 236 offends also Article 19 (1) (d) of the Constitution.

Assuming that Article 19 (1) (d) of the Constitution must be confined only to physical movements, its combination with the freedom of speech and expression leads to the conclusion we have arrived at. The act of surveillance is certainly a restriction on the said freedom. It cannot be suggested that the said freedom is also bereft of its subjective or psychological content, but will sustain only the mechanics of speech and expression. An illustration will make our point clear. A visitor, whether a wife, son or friend, is allowed to be received by a prisoner in the presence of a guard. The prisoner can speak with the visitor; but, can it be suggested that he is fully enjoying the said freedom? It is impossible for him to express his real and intimate thoughts to the visitor as fully as he would like. But the restrictions on the said freedom are supported by valid law. To extend the analogy to the present case is to treat the man under surveillance as a prisoner within the confines of our country and the authorities enforcing surveillance as guards, without any law of reasonable restrictions sustaining or protecting their action. So understood, it must be held that the petitioner's freedom under Article 19 (1) (a) of the Constitution is also infringed.

It is not necessary in this case to express our view whether some of the other freedoms enshrined in Article 19 of the Constitution are also infringed by the said Regulation.

In the result, we would issue an order directing the respondents not to take any measure against the petitioner under Regulation 236 of Chapter XX of the U.P. Police Regulations. The respondents will pay the costs of the petitioner.

ORDER OF THE COURT.—In accordance with the opinion of the majority this Writ Petition is partly allowed and Regulation 236 (b) which authorises "domiciliary visits" is struck down as unconstitutional. The petitioner would be entitled to

the issue of a writ of *mandamus* directing the respondent not to continue domiciliary visits. The rest of the petition fails and is dismissed. There will be no order as to costs.

V. S.

Petition partly allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. J. IMAM, K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

K. M. Shanmugam, Proprietor, K.M.S. Transport, Tanjore,
Madras State

.. *Appellant**

The S.R.V.S. (P.), Ltd., and others

.. *Respondents.*

Constitution of India (1950), Article 226—Scope of—Jurisdiction of—High Court to issue writ of certiorari—“Error of Law apparent on the face of the record”—Meaning of.

The question whether errors are errors of law or fact cannot be posited on a *priori* reasoning, but falls to be decided in each case. Thus the concept of “error of law apparent on the face of the record” cannot be postulated with any precision. It should be left, as it has always been done, to be decided in each case.

Any direction given under section 43-A of the Motor Vehicles (Madras Amendment) Act, 1948, for the purpose of considering conflicting claims for a permit by applicants can only be to enable the Regional Transport Authority to discharge its duties under section 47 of the Act more satisfactorily, efficiently and impartially. The disobedience of the instructions which are administrative in nature may not afford a cause of action to an aggrieved party but the transgression of the statutory law certainly does.

If on the basis of an error of law, it refuses to decide a relevant question, the fact that the Government also issued instructions to the Tribunal to apply some objective standards in deciding such a question does not make the said question any the less a relevant consideration under section 47 of the Motor Vehicles Act.

Appeal by Special Leave from the Judgment and Order dated the 21st March, 1962 of the Madras High Court in Writ Appeal No. 154 of 1960.

B. Sen, Senior Advocate (Ravinder Narain, O. C. Mathur and J. B. Dadachanji, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (R. Gopalakrishnan, Advocate, with him), for Respondent No. 1.

A. Ranganadham Chetty, Senior Advocate (A. V. Rangam, Advocate, with him), for Respondents Nos. 2 and 3.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave is directed against the Judgment of a Division Bench of the High Court of Judicature for Madras confirming that of a single Judge of that Court allowing the petition filed by the respondent under Article 226 of the Constitution and quashing the order made by the State Transport Appellate Tribunal granting a stage carriage permit to the appellant for the route Tanjore-Mannargudi via Vaduvor.

The facts relevant to the question raised may be briefly stated. The Regional Transport Authority, Tanjore, called for applications in respect of the issuing of a stage carriage permit for the route Tanjore-Mannargudi via Vaduvor. 11 persons applied for the permit. The Regional Transport Authority, adopting the marking system prescribed in G.O. Ms. No. 1298 (Home), dated 28th April, 1956, awarded marks to different applicants: the appellant got the highest number of marks, viz., 7, and the first respondent got only 4½ marks, with the result the appellant was preferred to the respondent and a permit was issued to him. It is not necessary to notice the marks secured by the other applicants before the Regional Transport Authority, for they are not before us. Total of the said marks secured by each

of the said two parties was arrived at by adding the marks given under the following heads :

<i>Viable Unit</i>	<i>Workshop</i>	<i>Residence</i>	<i>Experience</i>	<i>Special circumstances.</i>	<i>TOTAL</i>
1	2	3	4	5	
K.M.S. 4	1	1	$\frac{1}{2}$	$\frac{1}{2}$	7
S.R.V.S.	1	1	1	$\frac{1}{2}$	$4\frac{1}{2}$

It would be seen from the said table of marks that if the 4 marks secured by the appellant under the first column "Viable Unit" were excluded from his total, he would have got only a total of 3 marks under the remaining heads and the first respondent would have got a total of $4\frac{1}{2}$ marks under the said heads. Under the said G.O., as interpreted by this Court, the marks under the first column i.e., those given under the head "Viable Unit", would be counted only if other things were equal; that is to say, if the total number of marks obtained by the said two applicants under Cols. 2 to 5 were equal. It is, therefore, obvious that on the marks given the Regional Transport Authority went wrong in issuing a permit in favour of the appellant, as he should not have taken into consideration the 4 marks given under the 1st Column since the total marks secured by him under Cols. 2 to 5 were less than those secured by the first respondent. Aggrieved by the said order, the first respondent preferred an appeal to the State Transport Appellate Tribunal, hereinafter called the Appellate Tribunal. The said Appellate Tribunal recast the marks in respect of the said two parties in the following manner :

<i>Viable Unit</i>	<i>Workshop</i>	<i>Residence</i>	<i>Experience</i>	<i>Special circumstances</i>	<i>TOTAL</i>
1	2	3	4	5	
K.M.S. 4	2	1	$\frac{1}{2}$	$\frac{1}{2}$	8
S.R.V.S.-	2	—	1	1	4

It would be seen from the marks given by the Appellate Tribunal that the total of the marks secured by the appellant under Cols. 2 to 5 is equal to that secured by the first respondent under the said columns, each of them securing 4 marks. It was contended before the Appellate Tribunal that the first respondent was entitled to some mark under the column "Residence or place of business" on the ground that it had the places of business at Tanjore and Mannargudi and that the Regional Transport Authority had given one mark to the first respondent under the said column; but the Appellate Tribunal rejected that contention on the ground that the first respondent had a branch office at Kumbakonam and, therefore, the office at Tanjore or Mannargudi could not be treated as a branch office. Aggrieved by that order, the first respondent filed a petition before the High Court under Article 226 of the Constitution for setting aside that order. Ramachandra Iyer, J., who heard the said application allowed it. The main reason given by the learned Judge for allowing the petition was that the Appellate Tribunal omitted to give any mark in respect of residential qualification, which amounted to refusal to take into consideration the admitted fact, namely, the existence of a workshop at Mannargudi and, therefore, it amounted to a breach of section 47 (1) (a) and (c) of the Motor Vehicles Act. The same idea was expressed by the learned Judge in a different way thus :

".....in regard to residential qualification, it (the Appellate Tribunal) declined to consider whether the office workshop at Mannargudi are sufficient to entitle the petitioner to any marks under head for the mere reason that it was a branch of a branch office."

He held that the said refusal was an error apparent on the face of the record; and he accordingly quashed the order and at the same time indicated that the result

was that the State Transport Appellate Tribunal would have to dispose of the appeal afresh. The Letters Patent appeal filed by the appellant was heard by a Division Bench consisting of Anantanarayanan and Venkatadri, JJ. The learned Judges dismissed the appeal and the reason of their decision is found in the following remarks :

"In essence, the Judgment really proceeds on the basis that with regard to the claim of the respondent to some valuation under Col. 3, arising from the existence of an alleged branch office at Mannargudi there has been no judicial disposal of the claim."

They also observed :

"The Tribunal is, of course, at liberty to adopt its own criteria for the valuation under Col. 2, provided they are consistently applied, and based upon some principle."

In dismissing the appeal the learned Judges concluded :

"... we desire to make it clear that we are not in any way fettering the discretion of the State Transport Appellate Tribunal to arrive at its own conclusion on the claims of the two parties irrespective of any observations that might have been incidentally made by this Court on these claims."

The appellant has preferred the present appeal by Special Leave against the said order.

It will be seen from the aforesaid narration of facts that the High Court issued the writ as it was satisfied that there was a clear error apparent on the face of the record, namely, that the Appellate Tribunal refused to take into consideration the existence of the branch office at Mannargudi for awarding marks under the head "residence" on the ground that there was another office of the first respondent at Kumbakonam. While it gave marks to the appellant for his residence, it refused to give marks to the first respondent for its office on the aforesaid ground.

Mr. Sen, learned Counsel for the appellant, raised before us the following points : (1) The High Court has no jurisdiction to issue a writ of *certiorari* under Article 226 of the Constitution to quash an order of a Tribunal on the ground that there is an apparent error of fact on the face of the record, however, gross it may be, and that, in the instant case, if there was an error, it was only one of fact; (2) this Court has held that directions given under section 43 of the Motor Vehicles Act are only administrative in character and that an order made by a Tribunal in breach thereof does not confer a right on a party affected and, therefore, the Appellate Tribunal's order made in derogation of the said directions could not be a subject-matter of a writ.

The argument of Mr. Viswanatha Sastri, learned Counsel for the first respondent, may be summarized thus :

The petitioner (appellant herein) has a fundamental right to carry on business in transport. The Motor Vehicles Act is a law imposing reasonable restrictions in public interest on such right. The Appellate Tribunal can decide, on the material placed before it, whether public interest would be better served if the permit was given to the appellant or the first respondent within the meaning of section 47 of the said Act. The Government, in exercise of its powers under section 43 of the said Act, gave administrative directions embodying some principles for enabling the Tribunal to come to a conclusion on the said point. The Tribunal had jurisdiction to decide the said question on the basis of the principles so laid down or *de hors* them. In either view, it only decides the said question. The first respondent raised before the Tribunal that public interest would be better served if a permit was issued to it as it had a well-equipped branch office at Mannargudi. The said question was relevant in an inquiry under section 47 of the said Act, whether the Tribunal followed the instructions given by the Government or ignored them. In coming to a conclusion on the said question, the Tribunal made a clear error of law inasmuch as it held that in the case of the first respondent, as it had a branch at Kumbakonam, its other branch at Mannargudi should be ignored. This, the learned Counsel contends, is an error apparent on the face of the record. He further contends that the scope of an inquiry under Article 226 is wide and that it enables

the Court to issue an appropriate direction even in a case of an error of fact apparent on the face of the record.

It is not necessary to express our opinion on the wider question in regard to the scope and amplitude of Article 226 of the Constitution, namely, whether the jurisdiction of the High Court under the said Article to quash the orders of Administrative Tribunals is confined only to circumstances under which the High Court of England can issue a writ of *certiorari* or is much wider than the said power, for this appeal can satisfactorily and effectively be disposed of within the narrow limits of the ambit of the English Court's jurisdiction to issue a writ of *certiorari* as understood by this Court. If it was necessary to tackle the larger question, we would have referred the matter to a Bench of 5 Judges as it involved a substantial question of law as to the interpretation of the Constitution; and under Article 145 thereof such a question can be heard only by a Bench of at least 5 Judges. In the circumstances a reference to the decisions of this Court cited at the Bar, which are alleged to have expressed conflicting views thereon, is not called for. We shall, therefore, confine ourselves to the narrow question.

Adverting to the scope of a writ of *certiorari* in Common Law, this Court, in *Hari Vishnu Kamath v. Syed Ahmed Ishaque*¹, laid down the following propositions :—

(1) *Certiorari* will be issued for correcting errors of jurisdiction, as when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.

(2) *Certiorari* will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.

(3) The Court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the Court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous.

(4) An error in the decision or determination itself may also be amenable to a writ of *certiorari* but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law.

This view was followed in *Nagendra Nath Bora v. The Commissioner, Hills Division and Appeals, Assam*², *Satyanarayan v. Mallikarjun*³, *Shri Ambica Mills Co. v. S.B. Bhutt*⁴ and in *Provincial Transport Services v. State Industrial Court, Nagpur*⁵. But the more difficult question is, what is the precise meaning of the expression "manifest error apparent on the face of the proceedings"? Venkatarama Ayyar, J., attempted to define the said expression in *Hari Vishnu Kamath's case*¹ thus :

"Mr. Pathak for the 1st respondent contended on the strength of certain observations of Chagla, C.J., in *Batuk K. Vyas v. Surat Municipality*⁶ that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

It would be seen from the said remarks that the learned Judge could not lay down an objective test, for the concept necessarily involves a subjective element. Sinha, J. as he then was, speaking for the Court in *Nagendra Nath Bora's case*², attempted to elucidate the point further and proceeded to observe at pages 1269-70 thus :

"It is clear from an examination of the authorities of this Court as also of the Courts in England, that one of the grounds on which the jurisdiction of the High Court on *certiorari* may be invoked, is an error of law apparent on the face of the record and every error either of law or fact, which can be corrected by a superior Court, in exercise of its statutory powers as a Court of appeal or revision."

This decision assumes that the scope of a writ in the nature of *certiorari* or an order or direction to set aside the order of an inferior tribunal under Article 226 of the Constitution is the same as that of a Common Law writ of *certiorari* in England : we

1. (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 : (1955) 1 S.C.R. 1104, 1121, 1123.
2. (1953) S.C.J. 798 : (1953) S.C.R. 1240.
3. (1960) S.C.J. 1065 : A.I.R. 1960 S.C. 137.
4. (1961) 1 S.C.J. 643 : (1961) 1 M.L.J. (S.C.)

198 : (1961) 1 An.W.R. (S.C.) 198 : A.I.R. 1961 S.C. 970.
5. (1963) 2 S.C.J. 412 : A.I.R. 1963 S.C. 114.
6. A.I.R. 1953 Bom. 33.

do not express any opinion on this in this case. This decision practically accepts the opinion expressed by this Court in *Hari Vishnukamath's case*¹. The only addition it introduces is the antithesis it made between "error of law and error of fact" and "error of law apparent on the face of the record". But the question still remains in each case whether an error is one of law or of fact and that falls to be decided on the facts of each case. Das Gupta, J., makes yet another attempt to define the expression when he says in *Satyanarayan v. Mallikarjun*², at page 141 thus :

"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. As the above discussion of the rival contentions show the alleged error in the present case is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments."

The learned Judge here lays down the complex nature of the arguments as a test of an apparent error of law. This test also may break, for what is complex to one judicial mind may be clear and obvious to another : it depends upon the equipment of a particular Judge. In the ultimate analysis the said concept is comprised of many imponderables : it is not capable of precise definition, as no objective criterion can be laid down, the apparent nature of the error, to a large extent, being dependent upon the subjective element. So too, in some cases the boundary between error of law and error of fact is rather thin. A tribunal may hold that 500 multiplied by 10,000 is 5 lakhs (instead of 50 lakhs); another tribunal may hold that a particular claim is barred by limitation by calculating the period of time from 1956 instead of 1961 ; and a third tribunal may make an obvious error deciding a mixed question of fact and law. The question whether the said errors are errors of law or fact cannot be posited on *a priori* reasoning, but falls to be decided in each case. We do not, therefore, propose to define with any precision the concept of "error of law apparent on the face of the record"; but it should be left, as it has always been done, to be decided in each case.

The only question, therefore, is whether the State Transport Appellate Tribunal committed an error of law apparent on the face of the record. A look at the provisions of section 47 and section 43 of the Motor Vehicles Act, 1939, as amended by the Madras Legislature, will facilitate the appreciation of the problem. Under section 47 a Regional Transport Authority in considering an application for a stage carriage permit is enjoined to have regard, *inter alia*, to the interests of the public generally. Section 43-A, introduced by the Madras Legislature by the Motor Vehicles (Madras Amendment) Act, 1948, says that the State Government may issue such orders and directions of a general character as it may consider necessary in respect of any matter relevant to road transport to the State Transport Authority or to a Regional Transport Authority and such Transport Authority shall give effect to all such orders and directions. It has been held by this Court in *M/s. Raman & Raman, Ltd. v. The State of Madras*³, that section 43-A conferred a power on the State Government to issue administrative directions, and that any direction issued thereunder was not a law regulating rights of parties. It was also pointed out that the order made and the directions issued under section 43-A of the Act cannot obviously add to, or subtract from, the consideration prescribed under section 47 thereof on the basis of which the Tribunal is empowered to issue or/ refuse to issue a permit, as the case may be. It is, therefore, clear that any direction given under section 43-A for the purpose of considering conflicting claims for a permit by applicants can only be to enable the Regional Transport Authority to discharge its duties under section 47 of the Act more satisfactorily, efficiently and impartially. To put it differently, the directions so given cannot enlarge or restrict the jurisdiction of the said Tribunal or Authority but only afford a reasonable guide for exercising the said jurisdiction. Concretely stated, an applicant in advancing his claim for a permit may place before

1. (1955) S.C.J. 267 : (1955) 1 M.L.J. 37. (S.C.) 157 : (1955) 1 S.C.R. 1104, 1121, 1123.
2. (1960) S.C.J. 1065 : A.I.R. 1960 S.C. 37.
3. (1959) S.C.J. 1156 : (1959) 2 M.L.J. (S.C.) 236 : (1959) 2 An.W.R. (S.C.) 236 : (1959) M.L.J. (Ch.) 844 : (1959) Supp. 2 S.C.R. 227.

the Authority an important circumstance in his favour, namely, that he has a branch office on the route in respect whereof he seeks for a permit. He may contend that he has an office on the route, and that the interests of the public will be better served, as the necessary amenities or help to meet any eventuality in the course of a trip will be within his easy reach. The Government also under section 43-A may issue instructions to the Regional Transport Authority that the existence of an office of a particular applicant on the route would be in the interests of the public and, therefore, the said applicant should be given a preferential treatment if other things are equal. The issue of such an instruction only emphasizes a relevant fact which an Authority has to take into consideration even if such an instruction was not given. But if the Authority under a manifest error of law ignores the said relevant consideration, it not only disobeys the administrative directions given by the Government, but also transgresses the provisions of section 47 of the Act. The disobedience of the instructions which are administrative in nature may not afford a cause of action to an aggrieved party, but the transgression of the statutory law certainly does. What is the position in the present case?

The Government issued G.O. No. 1298 (Home), dated 28th April, 1956, introducing a marking system for assessing the merits of applicants for stage carriage permits. Column 3 reads thus :

"Location of residence or place of business of the applicant on the route or at the terminal : This qualification not only is in favour of local enterprise but also secures that the owner will pay prompt and reagent attention to the service entrusted to him. One mark may be assigned to this qualification." Under this instruction the location of the residence or the place of business is considered to be in the interests of the public, for whose benefit the service is entrusted to a permit-holder. The first respondent contended before the Regional Transport Authority that he had branch offices at Tanjore and Mannargudi and therefore that fact should be taken into consideration and a mark should be given to him thereunder. The Regional Transport Authority gave one mark to the appellant and also one mark to the first respondent under that column. But the Appellate Tribunal refused to give any mark under that column to the first respondent for the following reasons :

"On behalf of the other appellants and the Respondent it is contended that appellant No. 1 (1st respondent before the Supreme Court) is a Private Ltd. Company having its registered office at Madras, that their offices at Kumbakonam is only a branch office, that the offices if any at Tanjore or at Mannargudi cannot be treated as branch offices, and that, as such they are not entitled to any mark in column 3 of the mark list. This contention is a valid one."

In regard to the Tanjore office the said Appellate Tribunal has given an additional reason by holding on the facts that it was not an office at all. We can, therefore, ignore the Tanjore office for the purpose of this appeal. So far as the Mannargudi office is concerned, the decision of the Appellate Tribunal was based upon an obvious error. It took the view that if a company had a branch office at one particular place, it could not have in law any other branch office though it had one in fact. Whatever conflict there may be, on which we do not express any opinion, in a tax law or the company law, in the context of the marking system and the evaluation of an amenity in the interest of the public, it is obviously an untenable proposition to hold that even if a company has a well-equipped office on a route in respect of which a permit is applied for, it shall be ignored if the company has some other branch somewhere unconnected with that route. That was what the Appellate Tribunal held and in our view it is an error apparent on the face of the record. On that erroneous view, the Appellate Tribunal did not decide the relevant question raised, namely, whether the respondent has any such office at Mannargudi. Both Ramachandra Iyer, J., at the first instance, and Anantanarayanan and Venkatadri, JJ., in appeal, rightly pointed out this error. As this is an error apparent on the face of the record, they quashed the order of the Appellate Tribunal and left the question open for decision by it. In our view, the conclusion arrived at by the High Court is correct.

It remains only to notice the decisions on which strong reliance is placed by learned Counsel for the appellant in support of his contention.

In *Messrs. Raman & Raman, Ltd. v. The State of Madras*¹, the relevant facts were: the appellant and the 4th respondent therein, along with others, were applicants for a stage carriage permit. The Regional Transport Authority granted the permit to the appellant on the basis of instructions issued by the State Government under section 43-A of the Motor Vehicles Act; on appeal, the Central Road Traffic Board set aside that order on the footing of fresh instructions issued by the Government; and a Division Bench of the Madras High Court dismissed the writ petition filed by the appellant. It was, *inter alia*, contended before this Court that the instructions given under section 43-A being law regulating rights of parties, the Appellate Authority could not ignore that law and set aside the order of the Regional Transport Authority on the basis of subsequent instructions. The contention was rejected on the ground that instructions under section 43-A were not law, but were only administrative directions and that the fact that the Appellate Tribunal ignored them would not affect its jurisdiction if it had come to a decision having regard to the considerations laid down in section 47 of the Act. The question before the Tribunal was whether a small unit or a large one would be viable or would be in the interest of the public. There was scope for taking different views on the question, and the Appellate Tribunal, contrary to the earlier directions, came to the conclusion that smaller units would be more in the interest of the public than larger ones. This judgment, therefore, is an authority only for the position that a Tribunal in issuing or refusing to issue a permit to an applicant would be acting within its jurisdiction notwithstanding the fact that it ignored the administrative directions given by the Government under section 43-A of the Act, provided it had come to a decision on the relevant considerations laid down in section 47 of the Act.

In *Abdulla Rowther v. The State Transport Appellate Tribunal, Madras*², the Regional Transport Authority issued a permit each to the appellant therein and to one Gopalan Nair. On appeal, the Appellate Tribunal set aside that order and gave the permits to respondents 3 and 4. Both the Regional Transport Authority and the Appellate Tribunal considered the applications on the basis of G.O. No. 1298 issued by the Government of Madras on 28th April, 1956. The Regional Transport Authority gave 4 marks each to the appellant and Gopalan Nair under Col. 1, which dealt with the building strength to viable units, and refused to give any marks to respondents 3 and 4 under the said column on the ground that they were fleet owners; with the result that the appellant and Gopalan Nair secured more marks than respondents 3 and 4 and were, therefore, given the permits. But the Appellate Tribunal held that the appellant and Gopalan Nair were not entitled to claim the benefit of the marks under Col. 1 as they had secured less marks than respondents 3 and 4 under Cols. 3 to 5 for they held, on a fair construction of the said G.O., that it was only when the marks obtained by applicants under Cols. 2 to 5 were equal, recourse could be had to Col. 1. On that basis, the Appellate Tribunal quashed the order of the Regional Transport Authority and gave the permits to respondents 3 and 4. The appellant challenged the said order by an application under Article 226 of the Constitution for a writ of *certiorari* in the High Court of Madras. Rajagopalan, J., dismissed the application on two grounds, namely, (1) that the construction of the G.O. was not shown to be wrong, and (2) that even if the G.O. was misconstrued, it would not justify the issue of a writ of *certiorari*, as the said G.O. embodied only administrative directions. The Letters Patent appeal filed against the said order was dismissed. The appeal filed to this Court was also dismissed. This Court followed the decision in *Messrs. Raman & Raman, Ltd. v. The State of Madras*¹, and held that the instructions given under section 43-A of the Motor Vehicles Act were only administrative directions and that, therefore, even if the rule as to the assignment of marks was infringed, it was not an error of law at all. This decision only follows the earlier decision and lays down that instructions given under section 43-A of the Motor Vehicles Act are only administrative directions and that a wrong construction of the said instructions would not enable the party

1. (1959) S.C.J. 1156 : (1959) 2 M.L.J. (S.C.) L.J. (Cr.) 844 : (1959) Supp. 2 S.C.R. 227,
6 : (1959) 2 An.W.R. (S.C.) 236 ; (1959) M. 2, A.I.R. 1959 S.C. 896.

affected to apply for a writ of *certiorari*. The instructions laid down a method of evaluations of the respective claims *vis-a-vis* the considerations laid down in section 47 of the Act. The Regional Transport Authority and the Appellate Tribunal have borne in mind the said considerations in deciding upon the rival claims, though they may have wrongly interpreted one of the instructions. It may be pointed out that in that case the interpretation put upon the instructions was a correct one, though this Court proceeded on the assumption also that they might have been wrongly interpreted. But the decision cannot obviously be an authority for the position that on a wrong interpretation of the administrative directions or *de hors* the said directions, a Tribunal can ignore the relevant considerations laid down in section 47 of the Act or on the basis of an error of law apparent on the record wrongly refuse to decide on any of such considerations.

To the same effect is the decision of this Court in *Ayyaswami Gounder v. M/s. Soudambigai Motor Service*¹. There, the Regional Transport Authority followed the marking system as laid down by the Government of Madras and gave to the appellant (therein) 5 marks and to the respondent 6 marks. Though the respondent got 6 marks, he was not given the permit, as in the view of the said Authority he was guilty of misconduct. As between the other applicants, the appellant having secured the highest number of marks, he was given a permit. But on appeal the Appellate Tribunal re-allotted the marks and under the re-allotment the appellant got the highest number of marks; and because of that fact and also for the reason that he was a small operator of two buses, who should be given an opportunity to build up a viable unit as quickly as possible, he was given the permit by the Appellate Tribunal upholding the order of the Regional Transport Authority. One of the questions raised there was whether the appellant was entitled to marks under Col. 2 for repair and maintenance facilities at Dharapuram—the Appellate Tribunal found that he had such facilities. The appellant filed a writ in the High Court and the learned single Judge thought that some mistakes had been committed by the Appellate Tribunal in the allotment of marks and that it acted in contravention of the directions given by the Government under the said G.O., but dismissed the petition on the ground that, as the said instructions are only executive directions, their contravention did not confer any right on the parties before the Tribunal. On Letters Patent Appeal a Division Bench of that Court set aside that order on the ground that the Appellate Tribunal had taken into consideration the following two irrelevant considerations: (i) the appellant's claim should suffer because of the punishment for his past misconduct, and (ii) the third respondent being a small operator, he would be entitled to better consideration than the appellant who was a monopolist. On appeal, this Court followed the decision in *M/s. Raman & Raman, Ltd. v. The State of Madras*² and *Abdullah Rowther v. The State Transport Appellate Tribunal*³ and held that under the said G.O. the Government issued only administrative directions and that the failure of the Transport Authorities to follow them would not entitle the respondents to a writ. As regards the two reasons given by the High Court, this Court came to the conclusion that they were not irrelevant considerations, but were considerations germane in the matter of issue of permits. In the result this Court allowed the appeal. This decision accepts two propositions, namely, (1) misconstruction or even disregard of the instructions, given by the Government does not confer a right upon an aggrieved party to file a writ, for the said instructions are only administrative directions and (2) the decision implies that if the Tribunal decides on irrelevant considerations, the Court can issue a writ. But in that case it came to the conclusion that no such irrelevant considerations weighed with the Tribunal.

The last of the cases relied upon is that in *Sankara Ayyer v. Narayanaswami Naidu*⁴. There too, the Regional Transport Authority and the State Transport

1. Civil Appeal No. 198 of 1962 (decided on 17th September, 1962).

2. (1959) S.C.J. 1156; (1959) 2 M.L.J. (S.C.) 236; (1959) 2 An.W.R. (S.C.) 236; (1959) M.L.J. (Cr.) 844; (1959) Supp. 2

S.C.R. 227.

3. A.I.R. 1959 S.C. 896.

4. Civil Appeal No. 213 of 1960 (decided on 10th October, 1960).

Appellate Tribunal considered the applications for the grant of a permit for a new route on the basis of the administrative directions given by the State Government. The Regional Transport Authority gave the appellant 3 marks on the basis that he was a small operator; but the Appellate Tribunal came to the conclusion that he was not entitled to any marks as a small operator. A single Judge of the High Court set aside the order of the Appellate Tribunal on the ground that it misconstrued the directions contained in the Government Order relating to small operators. But a Division Bench of that Court in Letters Patent appeal held, relying upon the earlier decision of this Court, that the said directions were only administrative in nature and that they did not confer any legal rights and in that view allowed the appeal. This Court again following the earlier decisions dismissed the appeal holding that by construing the administrative directions the Tribunal did not take irrelevant considerations or refused to take relevant considerations in the matter of issue of permits. It is always a controversial question whether the issue of a permit to a small operator or to a big operator would be in the interest of the public and a Tribunal is certainly entitled to take either view.

It will be seen from the aforesaid decisions that this Court only laid down that the instructions given under section 43-A of the Motor Vehicles Act were only administrative directions and that the infringement of those instructions by the Tribunal did not confer any right on a party to apply to a High Court for a writ under Article 226 of the Constitution. In all those cases the Tribunal either ignored the instructions or misconstrued them, but nonetheless decided the question of issue of permits on considerations relevant under section 47 of the Act. They are not authorities on the question whether a writ of *certiorari* would lie, where a Tribunal had on an obviously wrong view of law refused to decide or wrongly decided on a consideration relevant under section 47 of the Act, whether or not it was covered by the instructions given under section 43-A. For if on the basis of such an error of law, it refuses to decide a relevant question, the fact that the Government also issued instructions to the Tribunal to apply some objective standards in deciding such a question does not make the said question anytheless a relevant consideration under section 47 of the Act.

That is the position in the present case. As we have already indicated, on the basis of an error manifest on the record, namely, that a company cannot have a branch office on the route in question, if it has another branch elsewhere, it refused to take into consideration a relevant fact, namely, whether the respondent has an office on the said route. The High Court, therefore, was right in quashing the order of the Appellate Tribunal and giving an opportunity to the Tribunal to decide that question on merits.

In the result, the appeal fails and is dismissed with costs.

K.L.B.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction).

PRESENT :—S. J. IMAM, K. SUBBA RAO, RAGHUBAR DAYAL, AND J. R. MUDHOLKAR, JJ.

Abdul Aziz

.. *Appellant**

v.

The State of Maharashtra

.. *Respondent.*

Imports and Exports (Control) Act, (XVIII of 1947). section 5—Offence under—Imports (Control) Order, 1955—Competency of the licensing authority to impose condition that the goods imported be not sold—Liability of the Chairman of Manufacturers Co-operative Association for the offence.

The power conferred under section 3 (1) of the Imports and Exports (Control) Act, 1947, is not restricted merely to prohibiting or restricting imports at the point of entry but extends also to controlling the subsequent disposal of the goods imported. If the licensing authority has no such power, its control

* Criminal Appeal No. 168 of 1961.

over the import cannot be effective. If it cannot control their utilisation for that purpose, the imported goods after import can be diverted to different uses, defeating thereby the very purpose for which the import was allowed and power had been conferred on the Central Government to control imports. The provision in clause 5 of the Imports (Control) Order, 1955 empowering the licensing authority to attach a condition to the effect that the goods covered by the license shall not be disposed of except in the manner prescribed by the Licensing Authority is a valid provision which comes within the powers conferred by section 3 of the Act on the Central Government.

The contravention of any condition of a license amounts to the contravention of the provisions of sub-clause (4) of clause 5 of the Order and consequently to the contravention of the order made under the Act. It follows that if the Co-operative Association, the licensee does not comply with the conditions of the license it contravenes the order made under the Act, and makes itself liable to punishment under section 5 of the Act.

The appellant (Chairman of the Co-operative Association) intentionally aided the Association the licensee in committing the offence under section 5 of the Act and thus abetted the contravention of the condition of the license and therefore was guilty of the offence under section 5 of the Act.

Appeal by Special Leave from the Judgment and Order, dated the 3rd August, 1961, of the Bombay High Court in Criminal Appeal No. 99 of 1961.

Shaukat Husain and P. C. Agarwala, Advocates, for Appellant.

C. K. Daphlary, Solicitor-General of India and *D.R. Prem*, Senior Advocate, (*R. N. Sachthey*, Advocate, with them), for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—This appeal, by Special Leave, is against the order of the High Court of Bombay allowing the State appeal and convicting the appellant of the offence under section 5 of the Imports and Exports (Control) Act, 1947, hereinafter called the Act, for having contravened the Imports (Control) Order, 1955, hereinafter called the Order and sentencing him to three months' rigorous imprisonment and a fine of Rs. 2,000.

The appellant was the Chairman of the Malegaon Powerloom Sadi Manufacturer's Co-operative Association, Ltd., hereinafter called the Association. There were six other members of the Association. All the members were powerloom weavers. The appellant, as Chairman of the Association, applied for and obtained the licence, dated 2nd January, 1956, for the import of certain quantity of art silk yarn by the Association. The licence was issued subject to the condition that the goods would be utilised only for consumption as raw material or accessories in the licence-holders' factory and that no portion thereof would be sold to any party. The Association could not arrange for the necessary finances and therefore had the goods imported through Warden & Co., who financed the transaction. Part of the goods received was utilised in accordance with the condition of the licence, the rest was however sold by the said Warden & Co., as a result of the correspondence ending by a letter dated 13th November, 1956, from the appellant as Chairman of the Association to Warden & Co. The relevant portion of this letter is:

"In this connection we have to inform you that as the price of art silk yarn has fallen greatly it is not possible for our Association to take delivery of the balance goods. As such, you are therefore requested to dispose of the balance goods lying with you in such manner that our Association suffers no loss whatsoever, but gets a net profit of at least 4 per cent on these goods."

After the disposal of the goods Warden & Co. did pay to the Association a sum of Rs. 5,040 by way of profits of the Association.

The appellant and the other members of the Association were prosecuted for committing the offence under section 5 of the Act. They were acquitted by the trial Court. The State appealed against the acquittal of the appellant alone. The appeal was allowed, with the result that the appellant was convicted of the offence under section 5 of the Act. He has come up in appeal.

The various contentions raised for the appellant are:

(i) The Act was intended for the purpose of prohibiting or controlling imports and exports which, according to section 2 thereof, meant respectively bringing goods into and taking out of India by sea, land or air, and therefore any provision in the Order providing for the issue of a licence to import goods subject to the condition

that the goods covered by the licence be not disposed of except in the manner prescribed by the licensing authority could not be validly made in the exercise of the powers conferred on the Central Government under section 3 of the Act, as such a condition deals with the conduct of the licensee subsequent to the import of the goods. (ii) The Order does not provide for the imposition of the condition in the licence that the licensee is not to sell the imported goods. (iii) The contravention of any condition of the licence does not amount to a contravention of the provisions of the Act or an Order made thereunder and therefore is not punishable under section 5 of the Act. (iv) The Association was the licensee and therefore any contravention of the condition of the licence would be committed by the Association and not by its Chairman and consequently it would be the Association which should have been tried for the alleged offence under section 5 of the Act and not the Chairman. (v) The possession of the goods had not passed to the Association and therefore the Association could not be guilty of the offence. (vi) The appellant has no *mens rea* to commit the offence and therefore could not be guilty of the offence. (vii) Lastly, the sentence is severe.

The relevant provisions of the Act and the Order to which reference is necessary may now be quoted. The Preamble of the Act reads :

"An act to continue for a limited period powers to prohibit or control imports and exports.

Whereas it is expedient to continue for a limited period, powers to prohibit, restrict or otherwise control imports and exports."

Section 2 says that in the Act, 'import' and 'export' means respectively bringing into and taking out of India by sea, land or air. Section 3 empowers the Central Government, by order published in the Official Gazette, to make provisions for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases, and subject to such exceptions if any, as may be made by or under the order, the import and export of goods of any specified description. Section 5, the penalty section, provided, at the relevant time, that if any person contravened or attempted to contravene or abetted a contravention of any order made or deemed to have been made under the Act, he would be punishable with imprisonment for a term which may extend to one year, or with fine or with both. The section was amended in 1960 and as a result of the amendment the contravening of any condition of the licence granted under the Order, was also made punishable. The amended provision, however, is not applicable to the present case.

Clause 5 of the Order deals with the conditions of licence. Its relevant provisions read :

"(1) The licensing authority issuing a licence under this Order may issue the same subject to one or more of the conditions stated below :

(i) that the goods covered by the licence shall not be disposed of except in the manner prescribed by the licensing authority, or otherwise dealt with, without the written permission of the licensing authority or any person duly authorised by it ;

(2) A licence granted under this Order may contain such other conditions, not inconsistent with the Act or this Order, as the licensing authority may deem fit.

(4) The licensee shall comply with all conditions imposed or deemed to be imposed under this clause."

In support of the contention that the power conferred on the Central Government for making provisions for prohibiting, restricting or otherwise controlling import of goods can be exercised only with respect to the actual entry of the goods into the territory of India and not with respect to the control of the imported goods subsequent to their being brought into the territory, reference was made to the case reported as *The State of Bombay v. F.N. Balsara*¹. That case dealt with a different matter. It related to the powers under the Bombay Prohibition Act, 1949.

1. (1951) S.C.J. 478 : (1951) 2 M.L.J. 141 : (1951) S.C.R. 682.

The contention was that the Provincial Legislature could not make a law regarding production, manufacture, possession, transport, purchase and sale of intoxicating liquor in the exercise of the powers under Entry 31 of List, II, Seventh Schedule to the Government of India Act, 1935, as the word 'import' used in Entry 19 of List I of the same Schedule did not end with mere landing of the goods on the shore or their arrival in the customs house but did imply that the imported goods must reach the hands of the importer and he should be able to possess them. It was argued that the impugned Act dealt with import of goods and therefore encroached upon the legislative powers of the Central Legislature. It was in this context and in view of the principles applicable to the construing of the provisions laying down the legislative limits of different Legislatures that it was said at page 799 :

"Under the provisions of the Government of India Act, a limited meaning must be given to the word 'import' in Entry 19 of List I in order to give effect to the very general words used in Entry 31 of List II".

This observation cannot be applicable to the interpretation of the content of the words 'import' and 'export' in the Act in the present case.

In *Glass Chatons Importers & Users' Association v. Union of India*¹, it was contended that section 3 of the Act, in so far as it permitted the Central Government to make the order contemplated by sub-clause (h) of clause 6 of the Order which provides for the refusal to grant a licence if the licensing authority decided to canalize imports and the distribution thereof through special or specialized agencies or channels, was invalid. The contention was repelled, it being held that such a restriction on the right to carry on trade and to acquire property was not unreasonable. The point urged before us was not argued in that case, but the case dealt with the provision in the Order relating to the distribution of the imported goods through selected agencies, a stage subsequent to the actual import of goods and the Court held that provision good.

In *Daya v. Joint Chief Controller of Imports & Exports*², it was held that the provision contained in clause 6 (h) of the Order, empowering the Chief Controller of Imports and Exports to refuse a licence if the licensing authority had decided to canalize imports and distribution thereof through a special channel or agency, could be made in the exercise of the power conferred on the Central Government under section 3 of the Act.

It is clear therefore that the power conferred under section 3 (1) of the Act is not restricted merely to prohibiting or restricting imports at the point of entry but extends also to controlling the subsequent disposal of the goods imported. It is for the appropriate authority and not for the Courts to consider the policy, which must depend on diverse considerations, to be adopted in regard to the control of import of goods. The import of goods can be controlled in several ways. If it is desired that goods of a particular kind should not enter the country at all, the import of those goods can be totally prohibited. In case total prohibition is not desired, the goods could be allowed to come into the country in limited quantities. That would necessitate empowering persons to import under licences certain fixed quantities of the goods. The quantity of goods to be imported will have to be determined on consideration of the necessity for having those goods in the country and that again, would depend on the use to be made of those goods. It follows therefore that the persons licensed to import goods up to a certain quantity should be amenable to the orders of the licensing authority with respect to the way in which those goods are to be utilised. If the licensing authority has no such power, its control over the import cannot be effective. It may have considered it necessary to have goods imported for a particular purpose. If it cannot control their utilisation for that purpose, the imported goods, after import, can be diverted to different uses, defeating thereby the very purpose for which the import was allowed and power

1. (1962) 2 S.C.J. 213 : (1962) 1 S.C.R. 862.

1796,

2. (1963) 1 S.C.J. 632 : A.I.R. 1962 S.C.

had been conferred on the Central Government to control imports. It is therefore not possible to restrict the scope of the provision about the control of import to the stage of importing of the goods at the frontiers of the country. Their content is much wider and extends to every stage at which the Government feels it necessary to see that the imported goods are properly utilised for the purpose for which their import was considered necessary in the interests of the country.

We are therefore of opinion that the provision in clause 5 of the Order empowering the licensing authority to attach a condition to the effect that the goods covered by the licence shall not be disposed of except in the manner prescribed by the licensing authority is a valid provision which comes within the powers conferred by section 3 of the Act on the Central Government.

In support of the second contention that the Order does not provide for imposing the condition that the imported goods be not sold, reliance is placed on the decision in *East India Commercial Co. v. Collector of Customs*¹. In that case, a condition was imposed in the licence prohibiting the importer from selling the imported goods. Sub-clause (1) of clause (a) of Notification No. 2/ITC/48 dated 6th March, 1948 provided for imposing a condition in the licence to the effect that the importer shall not dispose of or otherwise deal with the goods without the written permission of the licensing authority or any person duly authorised. Sub-clause (v) of clause (a) of the Notification provided :

“that such other conditions may be imposed which the licensing authority considers to be expedient from the administrative point of view and which are not inconsistent with the provisions of the said Act.

The actual condition imposed, however, did not fall under sub-clause (1) of clause (a) and was sought to be supported by relying on sub-clause (v). This Court held that under that clause a licensing authority was competent to impose only such conditions as may be expedient from the administrative point of view. This Court further held that prohibiting an importer from disposing of the goods imported affects the rights of that person and therefore such a condition cannot be prescribed in the licence in the absence of a rule permitting that to be done. In the case before us, the licence has been issued under the Order of 1955. The language of sub-clause (2) of clause 5 of that Order is wide and permits the imposition of a condition which was outside sub-clause (v) of clause (a) of the Order of 1948. Sub-clause (4) of clause 5 further makes it obligatory upon the licensee to comply with all the conditions imposed or deemed to be imposed under clause 5. We therefore do not agree with the second contention and hold that the licensing authority is competent under the Order to impose the condition that the imported goods be not sold to any person and thus to affect the ordinary rights of the importer.

The third contention too has no force. Sub-clause (4) of clause 5 provides that the licensee shall comply with all conditions imposed or deemed to be imposed under that clause. The contravention of any condition of a licence thus amounts to the contravention of the provisions of sub-clause (4) of clause 5 of the Order, and consequently to the contravention of the order made under the Act. It follows that if the Association, the licensee, does not comply with the conditions of the licence about the use of the goods to be imported, it contravenes the order made under the Act and makes itself liable to punishment under section 5 of the Act.

The cases reported as *C.T.A. Pillai v. H.P. Lohia*² and *East India Commercial Co. v. Collector of Customs*¹, holding that the infringement of a condition in the licence not to sell goods imported to third parties is not an infringement of the Order, are not of help as they deal with the contravention of the conditions of the licence granted under orders dated 1st July, 1943 and 6th March, 1948 which did not contain a provision comparable with the provisions of sub-clause (4) of clause 5 of the Order of 1955.

We accept the fourth contention that it is the Association, the licensee, which alone could contravene the condition of the licence and thus contravene the Order,

1. (1963) 3 S.C.R. 338 : A.I.R. 1962 S.C. 1893. 2. A.I.R. 1957 Cal. 83.

but do not agree with the fifth contention that it could not be guilty of the offence as it had not got actual possession of the imported goods. For contravening the condition of the licence, actual possession of the imported goods is not necessary. Further, the possession of Warden & Co., would be possession of the Association, as the former was its agent to import the goods.

Re : the sixth point that the appellant had no intention to commit the offence, the finding of the High Court is against the appellant. The High Court rightly held him guilty of the offence under section 5 of the Act on a finding that he intentionally aided the Association, the licensee, in committing the offence under section 5 of the Act, and thus abetted the contravention of the offence by the Association. The appellant, as Chairman, authorised Warden & Co., to dispose of the goods which the Association did not want to utilise on account of the decline in price. He thus aided intentionally the Association in disposing of the goods through Warden & Co., and therefore abetted the contravention of the condition of the licence to the effect that the goods imported would be utilised by the licensee alone and would not be sold to any other party.

We do not consider that the sentence is severe in the circumstances of the case which indicate that from the very beginning the appellant, as Chairman of the Association, knew that the Association would not be able to utilise all the yarn to be imported under the licence applied for. The fact that Warden & Co., did pay over Rs. 5,000 to the Association indicates that the goods did fetch a price higher than the price paid for their importation. The case appears to be a deliberate case of securing import licence with a view to misapply the goods imported.

We, therefore, dismiss the appeal.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K.C. DAS GUPTA AND J.C. SHAH, JJ.

S. N. Ranade

.. *Appellant**

v.

The Union of India and another

.. *Respondents.*

Grant—Sanad—Construction—Grant of right in water—Exclusion of running water—Grant of bed of river—Not necessarily includes title to flowing water.

The Sanad refers to the rights in water, trees, grasses, wood, stones and hidden treasures. It is well settled that the word "water (*jal*)" refers to water in tanks or wells and does not refer to the flowing water of the river. Indeed, if a grant of the river including its flowing water is intended to be made the Sanad would have definitely used the word "river (*nadi*)" because it is well known that when rivers, drains or culverts are intended to be gifted, the Sanads usually use the words "*nadi* and *nalla*". Therefore, on a plain construction of the relevant words used in the Sanad, there can be no doubt that what is conveyed to the grantee by the Sanad is stationary or static water in the ponds or wells and not the flowing water of the river.

The language of the Sanad precisely defines the nature of the water that is conveyed and in doing so, by necessary implication, excludes the flowing water of the river.

The grant of the soil of the village including the bed of the river need not necessarily include the grant of the title to the flowing water of the river. [An alternative case on the ground of his rights as a riparian owner, was not allowed to be raised.]

Appeal from the Judgment and Decree, dated the 11th December, 1957 of the Bombay High Court in First Appeal No. 640 of 1953.

G. S. Pathak, Senior Advocate, (N. D. Karkhanis and B. Dutta, Advocates and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant.

C.K. Daphtary, Solicitor-General of India and *N.S. Bindra*, Senior Advocate. (*R. H. Dhebar*, Advocate for *P.D. Menon*, Advocate with them), for Respondents,

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short question which this appeal raises for our decision is whether the appellant Shankar Narain Ranade has established his title to the running water of the river Valdevi which runs through his Inam village Vadner. The said village had been granted to the ancestors of the appellant by the Peshwa Government in 1773 A.D. This grant was continued by the British Government when the British Government came in power. The river Valdevi has its origin in the hills of Trimbak and from those hills it flows to Vadner and then to Chchedi where it joins the river Darna and thus loses its individuality. The total length of this river is about 25 miles, while its length within the limits of Vadner village is about 2 miles and 2 furlongs. The Darna river after its conjunction with Valdevi proceeds towards Sangvi and there is merged with Godavari river. The appellant is one of the sharers in the Inam village of Vadner and he brought the present suit No. 12 of 1950 in the Court of the Civil Judge (Senior Division) at Nasik, claiming reliefs against the Union of India and the State of Bombay, respondents 1 and 2 respectively, on the basis of his title to the running water of the said river.

It appears that in 1942, during the period of the II World-War, the Military Authorities constructed barracks and other residential quarters for the army personnel within and outside the limits of Vadner. They also built a dam across the river Valdevi within the limits of Vadner and dug a well near the bank of the river. This well was fed with water carried by two channels drawn from the river. When the water reached the well, it was pumped from the well and duly stored in four reservoirs where it was filtered and then it was carried by means of pipes to the residential area occupied by the military personnel.

The appellant then approached the Military Authorities and also the Government of Bombay and claimed compensation for the use of the water and the lands by the Military Authorities. Since his request for adequate compensation was not met, he filed the present suit on the 11th March, 1950, in a representative character under Order I, rule 8, Civil Procedure Code. In this suit, the appellant speaking for himself and for the other sharers in the Inam village of Vadner alleged that the Jagirdars of the village were full owners of the entire area of that village, including the land, the stream and the water flowing through the stream within the limits of the village. According to the plaint, the acts of diversion of water committed by the Military Authorities had deprived the appellant and the other Inamdars of their right to utilise that water for their own gains and thus, had caused injury and damage to them. As compensation for this damage, the appellant claimed Rs. 1,11,250 from the respondents. The appellant further made a claim for Rs. 750 as compensation for the use of his land by the Military Authorities. The diversion of water and the use of land continued from 1942 to 1949. Some other incidental reliefs were also claimed by the appellant.

Respondent No. 2 contested the appellant's claim. It urged that the Inamdars were not the grantees of the soil, but were the grantees of the Royal share of the revenue only; and it was urged that in any case, they had no ownership over the flowing water of the Valdevi river. Respondent No. 1 adopted the written statement of respondent No. 2 and filed the Purshis in that behalf. According to the respondents, the river Valdevi had become a notified canal by virtue of a notification issued on the 17th February, 1913 under section 5 of the Bombay Irrigation Act, 1879, and in consequence, the Inamdars, had lost their rights, if any, in the waters of the said river and respondent No. 2 had the absolute right of the use of the said water. A plea of limitation was also made by both the Respondents.

The learned trial Judge made findings in favour of the appellant on all the issues. He held that the Inamdars were the grantees of the soil, that the river Valdevi and its flowing water belonged to them, that the notification on which

reliance was placed by the respondents was invalid, that the acts of the Military Authorities were unauthorised and that the appellant was consequently entitled to the compensation for the use, by the Military Authorities, of the water of the river and his lands and also for the loss of his income from the river bed. According to the trial Court, the appellant was entitled to this compensation only for two years before the date of the suit and the rest of his claim was barred by time. Accordingly, it passed a decree in favour of the appellant for an amount of Rs. 26,728-1-0 as compensation for the use of the water up to the 31st December, 1949, directed that the compensation for the use of water for the period subsequent to 1st January, 1950 should be ascertained in execution proceedings, and awarded compensation at Rs. 100 per annum for the use of the land, and Rs. 50 per annum for the loss of income from the river-bed during the period that the act of the Military Authorities continued.

This decree was challenged both by the appellant and the respondents by cross-appeals Nos. 634 of 1954 and 640 of 1953 respectively. The appellant claimed a larger amount of compensation, whereas, according to the respondents, no compensation was payable in respect of the alleged diversion of the running water of the river Valdevi. It appears that before the High Court, the respondents did not dispute the finding of the trial Court that the Inamdars were the grantees of the soil and conceded that the rights of the Inamdars such as they were to the waters of the river Valdevi had not been extinguished by the notification issued under the Bombay Irrigation Act. It was, however, urged that the Valdevi river being a notified canal, the Military Authorities could have used its water by making appropriate applications under sections 17 and 27 of the said Irrigation Act; but since there was no evidence to show that any such applications had been made, the said point did not survive. The main argument urged by the respondents in their appeal was that the appellant was not the owner of the running water of the stream and so, he had no right to claim any compensation for the alleged diversion of the said water by the Military Authorities. The High Court has substantially accepted this contention. It has held that as owners of the lands in the village situated on both banks of the river the Inamdars were entitled to the use of the water of the river as riparian owners and what belonged to them was water which they took out from the river and appropriated to their use; they were, however, not entitled to claim title over the flowing water of the river and so, the diversion of the flowing water of the river cannot sustain their claim for compensation. The decree passed by the trial Court in respect of compensation for the wrongful use of the lands was not challenged by the respondents. In the result, the High Court modified the decree passed by the trial Court by setting aside that part of it which related to the compensation for the use of the water of the Valdevi river by the Military Authorities and confirmed the rest of the directions issued by the decree. It is against this decree that the appellant has come to this Court with a certificate issued by the High Court; and the main point which has been urged before us by Mr. Pathak on behalf of the appellant is that the High Court was in error in rejecting the appellant's claim that the Inamdars of the village were the owners of the running water of the river Valdevi during its course within the limits of the Inam village of Vadner.

In support of the appellant's case, Mr. Pathak has urged that in construing the Sanad on which the appellant's title is founded, it would be necessary to bear in mind two important considerations. The first consideration is that the flowing water of a river constitutes property which can belong to a citizen either by grant or otherwise; and assistance is sought for this argument from the provisions of section 37 of the Bombay Land Revenue Code (Act V of 1879). Section 37 (1) provides, *inter alia*, that all public roads, lanes and paths which are not the property of individuals, belong to the Crown, and amongst the items of property specified in this clause are included rivers, streams, nallas, lakes, tanks and all canals and water-courses, and all standing and flowing water. The argument is that this subsection postulates that the items of property specified by it can belong to private individuals and it provides that if they are not shown to belong to private individuals

they would vest in the State. Therefore, in construing the Sanad, we ought to remember that the river and its flowing water constitute property which can be granted by the Ruler to a citizen.

The other consideration on which Mr. Pathak has relied is that under the provisions of section 8 of the Transfer of Property Act, it should be assumed that unless a different intention is expressly or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incident thereof. Mr. Pathak contends that assuming that prior to the grant, the Peshwa Government as the ruling power of the day was the owner of the river and its flowing water, when the said Government made a grant to the appellant's predecessors, the principle enunciated by section 8 of the Transfer of Property Act should be applied and the grant should be construed to include all rights, title and interest of the grantor, unless there is a contrary provision either expressly made, or implied by necessary implications.

Bearing these two considerations in mind, let us consider the terms of the Sanad itself: The Sanad is drawn in terms which are consistent with the pattern prevailing in that behalf in those days and contains the usual familiar recitals. The relevant portion of the Sanad reads as follows :—

" Seeing the respectable Brahmins, performing Snan Sandhya (bath and prayer) leading, ascetic life, devoted to the performance of their duties as laid down in Shruties and Smrities, the Government has constructed houses there and given to (them). Thinking that if the same are given to them, it would be beneficial to the Swami and to the Kingdom of

(a)

Swami, the village of m'uje Wadner, Pargana aforesaid in Swarajya as well as Moglai-Dutarfa (on both sides) has been given to them as Nutan

(c) (d) (e)

(New) Inam together with Sardeshmukhi, Inam Tizai, Kulbab-Kulkanu,

(f) (g)

Hali-Patti, and Pestr-Patti excluding (the rights of) Hakkadar and Inamdar and together with water, trees, grass, wood, stones and hidden treasures for maintenance of their families."

The Sanad then defines the shares in the current revenue of the said village amongst the respective sharers. In the concluding portion, it makes certain other provisions with which we are not concerned in the present appeal. This Sanad was executed in 1773 A.D. During the British rule, this Sanad was confirmed in 1858 A.D. It is common ground that the material terms which have been construed for the purpose of determining the title of the appellant are contained in the earlier Sanad.

It would be noticed that the Sanad refers to the rights in water, trees, grass, wood, stones and hidden treasures. It is well settled that the word "water (*jāl*)" refers to water in tanks or wells and does not refer to the flowing water of the river. Indeed, if a grant of the river including its flowing water is intended to be made, the Sanad would have definitely used the word "river (*nadi*)" because it is well known that when rivers, drains or culverts are intended to be gifted, the Sanads usually use the words "*nadi* and *nalla*". Therefore, on a plain construction of the relevant words used in the Sanad, there can be no doubt that what is conveyed to the grantee by the Sanad is stationary or static water in the ponds or wells and not the flowing water of the river. The specific reference to water meaning water of the well or the pond serves two purposes; it defines the kind of water which is conveyed, and by necessary implication, excludes the grant of flowing water of the river. Sanads containing words like these have frequently been considered by the Bombay High Court in the past and it has been consistently held that the word "water" means only water in the ponds or wells and does not refer to the flowing water of the river, *ride Annapurana Bai Gopal v. Government of Bombay*¹. Therefore, the two considerations on which Mr. Pathak strongly relied in support of his construction of the Sanad do not really assist him. The language of the Sanad precisely defines the nature

of the water that is conveyed and in doing so, by necessary implication, excludes the flowing water of the river.

Mr. Pathak, however, suggests that it is not disputed by the respondents that the Sanad in question grants title to the soil of the village and is not confined to the Royal share of the revenue only; and he argues that the grant of the soil necessarily means the grant of the bed of the river while it flows within the limits of the Inam village. If the bed of the river has been granted to the appellant's predecessors by the Sanad, why does it not follow that the water flowing on the said bed during the said limits belongs to the appellant? The title to the running water of the river must, Mr. Pathak says, go with the title to the bed of the river. There are two difficulties in accepting this contention. The first difficulty is that the use of the words "water (*jal*)" in the Sanad, as we have already held, excludes the running water of the river. Besides, it is by no means clear that the title to the flowing water of the river necessarily goes with the title to the bed of the river. As was observed by Lord Selborne in *William Lyon v. The Wardens, etc. of the Fishmonger's Company and the Conservators of the River Thames*.¹

"the title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it."

Therefore, the argument that the grant of the soil of the village including the bed of the river must necessarily include the grant of the title to the flowing water of the river cannot be accepted.

In this connection, it is necessary to remember that the river Valdevi flows through the village only for the distance of 2 miles and 2 furlongs. It is not a case where the whole of the stream of the river from its origin to its merging in another river runs entirely through this village. If a river takes its origin within the limits of an Inam village and its course is terminated within the limits of the same village, that would be another matter. In the present case, if the appellant's right to the flowing water of the river is conceded, it would mean that the Inamdars would be able to divert the water completely and destroy the rights of the other riparian owners whose lands are situated outside the village. They may be able to pollute the water or do anything with it to the prejudice of the said riparian owners. Such rights cannot be claimed by the appellant unless the Sanad in his favour makes the grant of the running water in terms. As we have already seen, the Sanad not only does not make any such grant, but by necessary implication also excludes the running water from the purview of the grant.

Mr. Pathak then attempted to argue that the diversion of the water of the river Valdevi during the relevant period affected the appellant's right as the riparian owner and that, according to him, would furnish him with a cause of action for claiming damages against the respondents. In this connection, Mr. Pathak invited our attention to the observations of Parke, B., in *Embrey and Another v. Owen*² "Flowing water" said Parke, B.,

"is *publicijuris* in this sense only that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only—The right to have a stream of water flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but this is not an absolute and exclusive right to the flow of all the water, but only subject to the right of other riparian proprietors to the reasonable enjoyment of it, and consequently it is only for an unreasonable and unauthorised use of this common benefit that any action will lie."

-In this connection Mr. Pathak has also referred us to the decision of the Privy Council in the *Secretary of State for India in Council v. Sannidhireju Subbarayudu and others*³, In that case, the Privy Council has elaborately considered the nature and extent

1. (1876) L.R. I.A.C. 662 at p. 683.

2. (1851) 6 Ex. 353 : 155 E.R. 579.

3. L.R. 59 I.A. 56 at pp. 63-64 : I.L.R. 55 Mad. 268 : 62 M.L.J. 213.

of the rights which a riparian owner can claim. "A riparian owner", observed Viscount Dunedin,

"is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. In ordinary cases, the fact that his land abuts on the stream makes him the proprietor of the bed of the stream *usque ad medium filum*. But he may not be. He may be ousted by an actual grant to the person on the other side, or he may be and often is ousted by the Crown when the stream is tidal and navigable, because where the stream is tidal and navigable the solum of the bed belongs to the Crown."

It was also observed that

"the right of a riparian owner to take water is first of all, for domestic use, and then for other uses connected with the land, of which irrigation of the lands which form the property is one. This right is a natural right and not in the strict sense of the word an easement, though in many cases it has been called an easement."

We do not, however, think that it is possible for us to allow Mr. Pathak to raise this alternative argument before us, because it is clear that the reliefs claimed by the appellant were based only on one ground and that was, the title to the flowing water of the river. In paragraph 8 of the plaint the appellant has specifically stated that he was claiming the amount of compensation for the use of water belonging to the plaintiff and in paragraph 3 it has been clearly averred that the running water of the river belongs to the appellant and so, by the unauthorised acts of the Military Authorities, the appellant and the Inamdars were not able to let out their bed of the stream for the plantation of water-melons etc. and were thus put to loss. In other words, the plaint has made no allegation even alternatively that the appellant and the other Inamdars of the village had certain rights in the flowing water of the river as riparian owners and the illegal acts of the Military Authorities had affected the said rights and thereby caused damage to them. In fact, as the High Court has pointed out, there is no evidence on the record which would sustain the appellant's claim that the acts of the Military Authorities had prejudicially affected the appellant's rights as a riparian owner to the use of the water, and that means, on the record there is nothing to show that any damage had been caused to the Inamdars of the village as a result of the diversion of the water caused by the Military Authorities. Therefore, we are satisfied that the appellant cannot now make an alternative case on the ground of his rights as a riparian owner.

This result is, the appeal fails and is dismissed with costs, two sets, one hearing fee.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, M. HIDAYATULLAH, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Girdharmal Kapur Chand

*Appellant **

v.

Dev Raj Madan Gopal

Respondent.

Partnership Act (IX of 1932), section 69 (2)—Registration before the partition of India at Lahore—Validity of after partition—Essential Supplies (Temporary Powers) Act (XXIV of 1946), section 2—"Edible oil-seed"—Meaning of.

The argument that the Registrar of Punjab with his office at Lahore, ceased to be a Registrar under the Indian Act, when on the partition of India Lahore became part of a foreign country and so the registration became the registration of a foreign country and thus ceased to be a Registration for India is wholly unsound. Once there was registration under the Indian Partnership Act, 1932, that registration continues to operate as registration under that Act and continues to be effective, in other words, valid registration in the eye of law as administered in India so long as the registration is not cancelled in accordance with law.

The phrase "Edible oil-seed" within the meaning of section 2 of the Essential Supplies (Temporary Powers) Act, 1946, does mean only an oil seed which is edible as an oil seed.

Appeal from the Judgment and Decree, dated 21st November, 1958, of the Punjab High Court in Regular First Appeal No. 266 of 1951.

C. B. Agarwala, Senior Advocate, (*A. N. Goyal*, Advocate, with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, (*O. P. Malhotra* and *Mohan Behari Lal*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Das Gupta, J.—The respondent a partnership firm carrying on business as commission agents in the town of Khanna in Punjab brought the suit out of which this appeal has arisen against the appellant firm for recovery of Rs. 17,615-10-0 claimed to be due to it on account of the purchases and sales made on behalf of the appellant firm. Between December, 1946 and 3rd February, 1947, 7,600 bags of cotton seeds were, according to the plaint purchased by the respondent on behalf of the appellant firm at various rates, out of which 5,300 bags are said to have been sold by it on behalf of the appellant firm between the dates of 2nd January, 1947 and 3rd February, 1947. Thus, on 3rd February, 1947, 2,300 bags of cotton-seeds were left on its hands. In May, 1947 the market for cotton-seeds was falling and so the respondent firm asked the appellant either to remove the goods within 48 hours on payment of the full price or pay something more by way of margin and informed them that otherwise the goods would be sold. As no reply was received, these 2,300 bags were sold on 24th May—some at the rate of Rs. 11-11-6 per maund and the rest at the rate of Rs. 11-12-0 per maund. Apart from these transactions in cotton-seeds the respondent firm, according to the plaint, also purchased 100 bales of cotton of which 50 bales were also sold on behalf of the appellant firm, so that after 14th February, 1947, 50 bales of cotton purchased by the appellant firm were lying with the respondent. These 50 bales were also sold by the respondent on 24th May, 1947 at the rate of Rs. 27-12-0 per maund, as the appellant took no action when the respondent asked them either to take away these bales on payment of the price or to put in more money by way of margin. On the accounts, it was said, Rs. 15,556-10-0 remained due to the plaintiff firm from the defendant firm. The suit was brought for the recovery of this amount together with interest.

In contesting the suit the appellant while admitting trade relations with the plaintiff firm disputed the correctness of the accounts. The plaintiff's case about the purchase of cotton-seeds and cotton bales and the fact that 2,300 bags of cotton-seeds and 50 bales of cotton purchased by it remained with the plaintiff firm was denied. It was also urged that the transactions were wagering contracts, and so void in law, that they being forward transactions were prohibited by law and further that the plaintiff firm was not a registered firm under the Indian Partnership Act, and therefore the suit did not lie.

The Trial Court rejected all the contentions in law and accepted the plaintiff's story as regards the transactions but held as regards the accounting, on a consideration of the evidence, that the plaintiffs were bound to give credit to the defendants for the sale of 2,300 bags of cotton-seeds at the contract rate of Rs. 14-5-0 per maund even though these were actually sold at a lower rate, and that the debit for the purchase of 2,300 bags would be calculated at the rate of Rs. 13-8-0 and Rs. 13-10-0 per maund the rates at which they were actually purchased even though they were agreed to be purchased at the rate of Rs. 14-5-0 per maund on 3rd February, 1947. The price of 2,300 bags of cotton seeds and 50 bales of cotton on the final sale was directed to be credited in favour of the defendant at the market rate on 28th May, 1947. Other directions as regards calculations of incidental charges and interest were also given. The Court appointed an Advocate as Commissioner for the purpose of calculating the amount due after ascertaining the market price. After consideration of the report submitted by the Commissioner, the learned Judge passed a final decree in favour of the plaintiff for Rs. 9,749-3-9 with proportionate costs.

Against this decree both the plaintiff and the defendant appealed to the High Court of Punjab. In the defendant's appeal it was contended that the suit was not properly entertained as the plaintiff firm was not registered under the Indian Partnership Act, 1932. It was also urged that the transactions were illegal being forward transactions in cotton and edible oil-seeds and thus prohibited by law. Both these contentions were rejected by the High Court. Two other minor points which were taken before the High Court and were rejected by it have not been repeated before us.

In the plaintiff's appeal, it was urged that the Trial Court had erred in its directions as regards the debits and credits for 2,300 bags of cotton-seeds for the purchases and sales on 23rd February, 1947. The High Court accepted the plaintiff's contention in part and held that the plaintiff was entitled to an extra amount of Rs. 3,244-12-0. In the result, the High Court dismissed the defendant's appeal but allowed the plaintiff's appeal to the extent that the decretal amount was increased by Rs. 3,244-12-0 thus making the decree one for Rs. 12,694.

On the strength of the certificate granted by the High Court under Article 133 (1) (a) of the Constitution, the defendant firm has preferred the present appeal.

The appellant's first contention is, as in the Courts below, that the suit should have been dismissed altogether. Two grounds of law are urged in support of this. The first is based on the requirement of section 69 (2) of the Indian Partnership Act. It is no longer disputed that the firm was registered by the Registrar of Firms, Punjab, on 16th August, 1946, under the Indian Partnership Act, 1932, as it stood on that date. That was an order made before the partition of India took place. The entire Province of Punjab was then within British India; there was one Registrar for the entire Province and it is not disputed that that registration made by the Registrar whose office was at Lahore was upto the 14th August, 1947, good registration for the whole of what was then British India. The appellant contends that as soon as the partition of India took place that registration ceased to be effective for that part of the old British India which became the Dominion of India and so continued to be ineffective for the entire area also after the Constitution of India came into force. It is argued that the Registrar of Punjab, with his office at Lahore, ceased to be a Registrar under the Indian Act, when on the partition of India Lahore became part of a foreign country. So, it is said, the registration became the registration of a foreign country and thus ceased to be a registration for India. In our opinion, this argument is wholly unsound. Once there was registration under the Indian Partnership Act that registration, in our opinion, continues to operate as registration under that Act and continues to be effective—in other words, valid registration in the eye of law as administered in India so long as the registration is not cancelled in accordance with law.

In coming to this conclusion, we have not overlooked the fact that difficulties may in certain circumstances arise as regards the recording of alterations in the firm name or its principal place of business (section 60); noting of closing and opening of branches (section 61); noting of changes in the name and address of partners (section 62); recording of changes on dissolution of a firm and recording withdrawal of a minor from the firm (section 63); rectification of mistakes in the Register (section 64); and amendment of Register by order of Court (section 65), by the fact of the Registrar, on whom duties are laid by these sections in connection with the above matters, being now at Lahore, that is, outside India. We have not thought it necessary however to investigate in the present case as to what arrangements have been made to cope with these difficulties. For, it is clear to us that the presence of such difficulties cannot in any way change the legal position that registration that was good registration under the Indian Act does not cease to be good registration under the same Act, so long as it is not cancelled in accordance with law. This view of law was taken by the Bombay High Court in *Bombay Cotton Export and Import Co. v. Bharat Sarvodaya Mill Co.*¹, and is in our opinion, the only possible view.

It is unnecessary for us to consider, for the purpose of the present appeal, whether such a registration would be effective registration, in an area which was outside British India, at the time of the registration; and on that we express no opinion.

For his next legal contention, viz., that the transactions were prohibited by law, Mr. Aggarwala argued, first that forward contracts in cotton as also oil seeds were prohibited by the orders made in 1943 under the Defence of India Rules and these prohibitions remained effective upto the date of the contracts in the present case by virtue of section 5 of the Essential Supplies (Temporary Powers) Act, 1946 (XXIV of 1946). That these were forward contracts is not disputed. It does appear that forward contracts in cotton and in oil-seeds including cotton-seeds were prohibited by the Cotton Options (Forward Contracts and Prohibition) Order, 1943 of the 1st May, 1943 and Oilseeds (Forward Contracts and Prohibition) Order, 1943 of the 29th May, 1943 respectively. The Defence of India Rules under which these orders were made had however ceased to be in force long before the date of the contracts in the present case. Unless therefore the prohibition orders were kept alive by some other provision of law the present transactions would not be hit by the prohibitory orders. To show that they had been kept alive, Mr. Aggarwala relied on section 5 of the Essential Supplies (Temporary Powers) Ordinance, 1946 and the same section of the Essential Supplies (Temporary Powers) Act, 1946 by which it was replaced. The section is in these words :

"5. *Continuance in force of existing orders.*—Until other provisions are made under this Ordinance any order, whether notified or not, made by whatever authority under rule 80-B, or sub-rule (2) or sub-rule (3) of rule 81 of the Defence of India Rules, in respect of any matter specified in section 3, which was in force immediately before the commencement of the Ordinance shall, notwithstanding the expiration of the said rules, continue in force as far as consistent with this Ordinance and be deemed to be an order made under section 3; and all appointments made, licences or permits granted and directions issued under any such order and in force immediately before such commencement shall likewise continue in force and be deemed to be made, granted or issued in pursuance of this Ordinance."

The Act continued the same phraseology. These provisions of the Ordinance or the Act, are however clearly of no assistance to Mr. Aggarwala's arguments. It is clear that before the order made under rule 81 of the Defence of India Rules continues in force notwithstanding the expiration of the Defence of India Rules, it is necessary that the order must be in respect of any matter specified in section 3. Section 3 empowers the Central Government to make various orders but only in connection with essential commodities. No order can therefore be considered to be "in respect of any matter specified in section 3" unless it is in respect of an essential commodity.

"Essential Commodity" is defined in section 2 to mean any of the following classes of commodities:—(i) foodstuffs, (ii) cotton and woollen textiles, (iii) paper (iv) petroleum and petroleum products, (v) spare parts of mechanically propelled vehicles, (vi) coal, (vii) iron and steel and (viii) mica. "Foodstuffs" was also defined thus: "Foodstuffs" shall include "edible oilseeds and oils." Cotton-seed is an oilseed but it cannot for a moment be suggested that it is fit for human consumption. So, clearly, it is not an oilseed which is edible. Mr. Aggarwala as a last resort argued that what "edible oil-seed" means is a seed from which edible oil can be prepared. Such an argument has only to be mentioned to deserve rejection. The phrase "edible oil-seed" can never mean what the learned Counsel suggests and can and does mean only an oilseed which is edible as an oil-seed. Cotton-seed, not being edible, falls outside the class of "edible oil-seed" and so is not foodstuff within the meaning of section 2 of the Ordinance or the Act of 1946. The Cotton Seeds Order of 1943 which has been mentioned above is therefore not in respect of a matter specified in section 3 of the Ordinance or the Act and so was not kept alive by section 5. The Cotton Order has also not been kept alive, for raw cotton is not one of the articles included in the definition of "essential commodity" in section 2. It may be added that section 5 continues only such previous Orders as are consistent with the new law and clearly, as cotton and cotton-seeds are not included in the definition of "essential commodity, any previous Order" with respect

to them will be inconsistent with the new Order and cannot continue under section 5.

Mr. Aggarwala drew our attention to a Notification by the Central Government, dated the 4th November, 1949, by which cotton-seed was excluded from the operation of the Oilseeds Forward Contracts Prohibition Order, 1943, by omitting it from the schedule to the order. Mr. Aggarwala rightly contends that such exclusion would be unnecessary unless as a result of section 5 of the Essential Supplies (Temporary Powers) Act, 1946, the Oilseeds Order had remained alive upto November, 1949. We do not know what led the Central Government to make this Notification. It is not improbable that a question having arisen before the Government whether or not forward contracts in cotton-seeds continued to be Prohibited, in view of the provisions of section 5 of the Ordinance or the Act as mentioned above, the Government thought it proper to put the matter in doubt by making the notification excluding cotton-seeds altogether from the Schedule to the Prohibition Order. It is unnecessary for us to investigate the circumstances under which the order was made. For, the fact that Government thought that the effect of section 5 was to keep alive the Oilseeds Forward Contracts Prohibition Order, 1943 is not relevant at all. For the reasons mentioned earlier, we are clearly of opinion that section 5 cannot have that effect. Mr. Aggarwala's contention that the forward contracts in cotton-seeds which are the subject-matter of the present litigation were prohibited by law has therefore no substance.

This brings us to the question whether the High Court erred in allowing the plaintiff's appeal in increasing the amount decreed by Rs. 3,244-12-0. It appears that before the High Court it was urged on behalf of the plaintiff that there had been a clerical error in preparing the statement, Exhibit P-8, an extract from the *Saudabahi*—in that the purchase price and sale price for the transactions of 3rd February, 1947 was shown as Rs. 14-5-0 and Rs. 14-8-0 instead of the correct figures which were, according to *Saudabahi*, Rs. 13-5-0 and 13-8-0. It is obvious that this mistake would not affect the result as the difference between the credit entry and the debit entry for these transactions would remain the same. What the Trial Court did was that it took the sale price for 3rd February, transaction to be Rs. 14-5-0 as shown in Exhibit P-8 ; but for the purchase price which had to be debited against the defendant it rejected the figure of Rs. 14-8-0 shown in Exhibit P-8 but took the figure of Rs. 13-8-0 and Rs. 13-10-0 as shown in the plaintiff's account book. It seems to us likely that the arrangement between the parties was that the debits and credits in the running account should be on the basis of the rate at which the purchases and sales were actually made and not at the rate mentioned in the *Saudabahi*. This is clear from the fact that for both the sale and the purchase the account book shows the actual rates at which the purchases and sales were made (the purchase price being at the rate of Rs. 13-8-0 and Rs. 13-10-0 per maund and sales being at the rate of Rs. 13-5-0 and Rs. 13-7-0 per maund.) It is difficult to understand why the Trial Judge, though making the debits against the defendant at the lower rate of actual purchase, thought it fit to accept the *Saudabahi* rate for the sale. If for both debits and credits the actual rates at which the purchases and sales were effected are accepted, it is clear that the Trial Court's direction had resulted in crediting the defendant with Rs. 3,244-12-0 more than what was the correct figure. The High Court was therefore right in increasing the decretal amount by this sum of Rs. 3,244-12-0.

It may be pointed out that if the actual rates of purchases and sales in respect of these transactions of 3rd February, 1947 for 2,300 bags of cotton-seeds are rejected and the *Saudabahi* rates (according to Exhibit P-8) of Rs. 14-5-0 for the sale and Rs. 14-8-0 for the purchase are accepted as the basis for making the credits and debits, as Mr. Aggarwala asks us to do, the defendant would gain nothing at all.

We have therefore come to the conclusion that the High Court was right in allowing the plaintiff's appeal in part and increasing the decretal amount by Rs. 3,244-12-0.

The appeal is accordingly dismissed with costs.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Dr. Raghubir Saran

.. Appellant *

v.

The State of Bihar and another

.. Respondents.

Criminal Procedure Code (V of 1898), section 561-A—Scope—Powers of High Court in regard to expunging remarks made in its judgment or order by a Court against a person who is neither a party nor a witness to the proceeding—High Court refusing to expunge remarks—Supreme Court if can interfere in appeal by Special Leave.

Every High Court as the highest Court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of securing the ends of justice. This power extends to expunction or ordering expunction of irrelevant passages from a judgment or order of a subordinate Court and would be exercised by it in appropriate cases for securing the ends of justice. Being an extraordinary power it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate Court of its powers such as by passing comment upon a matter not relevant to the controversy before it and which is unwarranted or is likely to harm or prejudice another.

Where on a bail application the Magistrate called for a report from the Civil Assistant Surgeon who was also the Jail Superintendent whether the accused who made the bail applications for bail were ill, the Magistrate while granting bail observed that (a) the report appeared to be in the handwriting of some person other than the Doctor himself and was only signed by him and (b) "no actual examination report was attached with this petition." "It is an extreme case of carelessness on the part of the Doctor concerned" and ordered that a copy of the petition and order sheet be sent to the Civil Surgeon for information. On the application of the Doctor concerned for expunging the remarks against him.

Held : All this is very trivial and the remarks are not such as are likely to cause harm to the Doctor nor are such as should cause any harm to him. Accordingly it is not a fit case for the exercise of the extraordinary power of the High Court under section 561-A of the Code of Criminal Procedure.

Per Subba Rao, J.—A Judgment of a Criminal Court is final; it can be set aside or modified only in the manner prescribed by law. (2) Every judge, whatever may be his rank in the hierarchy, must have an unrestricted right to express his views in any matter before him without fear or favour. (3) There is a correlative and self-imposed duty on a Judge not to make irrelevant remarks or observations without any foundation, especially in the case of witnesses or parties not before him, affecting their character or reputation. (4) An appellate Court has jurisdiction to judicially correct such remarks but it will do so only in exceptional cases where such remarks would cause irreparable harm to a witness or a party not before it.

In the instant case it is not possible to say that the observation complained of is either irrelevant or without foundation. Where the High Court in exercise of its discretion, for the reasons given by it, refused to expunge the remarks it is clearly not a case meriting interference of the Supreme Court in its extraordinary jurisdiction under Article 136 of the Constitution.

Appeal by Special Leave from the Judgment and Order, dated 7th October, 1960 of the Patna High Court in Criminal Revision No. 460 of 1960.

B. B. Tawakley, Senior Advocate, (*Mrs. E. Udayaratnam and R. C. Prasad*, Advocates, with him), for Appellant.

D. P. Singh, M. K. Ramamurthi, R. K. Garg and S. C. Agarwal, (*Advocates of M/s. Ramamurthi & Co.*), for Respondent No. 1.

The Court delivered the following Judgments—

Subba Rao, J.—I have perused the judgment prepared by my learned brother Mudholkar, J. I agree that the appeal should be dismissed. But I would prefer to give my own reasons for doing so.

The facts giving rise to this appeal are simple. The appellant is a medical practitioner and during the year 1959 he was acting as Deputy Superintendent, Jahanabad Sub-Divisional Hospital and Superintendent, Sub-Jail, Jahanabad. A criminal case was pending before the Court of the Munsif-Magistrate, First Class, Jahanabad, and the two accused therein filed a petition in that Court for releasing them on bail. On 3rd October, 1959, the learned Munsif-Magistrate called for a report from the said medical officer of his opinion on the health of the said accused. The said officer examined the accused and sent the following report to the Munsif-Magistrate :

"Examined accused Ramsewak Dusadh and Ramdeo Dusadh of village Havellipur, P. S. Ghosi, district Gaya, and found that both of them are suffering from Hookworm infections and are anaemic."

On 19th October, 1959 the learned Munsif-Magistrate made the following order granting bail to the said accused :

"In view of the order, dated 3rd October, 1959 a petition signed by Superintendent, Sub-Jail, Jahanabad, is received. In this petition it is mentioned that the accused persons are suffering from Hookworm infection and hence they are anaemic. From the petition it appears that its body portion has been written by somebody else and it is simply signed by Mr. R. Saran, Superintendent. It is curious to note that no actual examination report has been attached with this petition. It is an extreme case of carelessness on the part of the Doctor concerned. He ought to have realised that a judicial order would be passed on his actual report and not on his petition. Hence let the copy of this petition and ordersheet be forwarded to the Civil Surgeon, Gaya, for information. It is argued by the lawyer appearing on behalf of the accused that these accused persons are poor and would not be in a position to defend themselves, in case they would not be allowed bail. I therefore on considering their poor circumstances and ill health allow them to remain on bail on Rs. 500 with one surety for the like amount."

After making some infructuous attempts through administrative channels to get the said remarks against him expunged, the said medical officer filed a Revision Petition under sections 435 and 439 of the Code of Criminal Procedure against the said order in the High Court of Judicature at Patna. The High Court dismissed the Revision Petition. Hence the appeal.

Learned Counsel for the appellant contended that the remarks made by the learned Munsif-Magistrate were unjustified and groundless and that they would affect the appellant's future official career and, therefore, the High Court should have expunged the said remarks. Learned Counsel for the respondents, apart from justifying the remarks, contended that the High Court had no jurisdiction to expunge the remarks from the judgment which had become final.

At the outset I would like to make it clear that I am not expressing my opinion, on the question whether the High Court in an appeal or a revision filed therein by an aggrieved party can expunge the remarks made by the trial Court in its judgment in disposing of the said appeal or revision. I am only addressing myself to the limited question whether in a case where the judgment has become final, that is to say, when no appeal has been preferred against the judgment by an aggrieved party, the High Court can expunge any remarks found therein at the instance of a third party. I am also confining the scope of my judgment to the power of an appellate Court to expunge remarks in a criminal case.

The only power on which reliance is placed by learned Counsel for the appellant is that contained in section 561-A of the Code of Criminal Procedure, which reads :

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The Judicial Committee in two decisions, viz., *Emperor v. Nazir Ahmad*¹, and *Jairam Das v. Emperor*², had taken the view that the said section gives no new powers but only provides that those which the Court already inherently possesses shall be preserved.

What is the scope of this inherent power? Can it be invoked in a case where the judgment has become final to expunge the remarks made therein? By expunging remarks what does the appellate Court do? Substantially it strikes out a part of the judgment. Sometimes the part struck out may be an integral part of the judgment, that is to say, the conclusion may not flow in the absence of the part deleted. On some occasions remarks made by a Court on the credibility of a witness, however exaggerated they may be, may be the sole reason for not believing that witness. There may also be other occasions when the remarks may be so irrelevant that they may not have any direct impact on the judgment, but such instances will be very

1. L.R. 71 I.A. 203 : (1945) 1 M.L.J. 86 :
(1945) F.L.J. 48 : A.I.R. 1945 P.C. 18, 22.

2. L.R. 72 I.A. 120 : (1945) 2 M.L.J. 40 :
(1945) 47 Bom.L.R. 634 (P.C.).

rare. Whatever may be the degree of impact, the result of expunging remarks from a judgment is that it derogates from its finality. There is no provision in the Code of Criminal Procedure which enables an Appellate Court in a case where the order of a lower Court has become final between the State and the accused to modify the said order by deleting or striking out some of the observations found therein. Does section 561-A of the said Code confer such a power? The conflicting views on this question are reflected in some of the judgments cited at the Bar. Sulaiman, J. in *Panchanan Banerji v. Upendra Nath Bhattacharji*¹, holds that section 561-A of the Code of Criminal Procedure, which was added in 1923, confers such a power and he does not see any reason why such an inherent power should not comprise a power to order a deletion of passages which are either irrelevant or inadmissible and which adversely affect the character of persons before the Court. Tek Chand, J., in the matter of *Daly and others*², also concedes such a power to an appellate Court. Beaumont, C.J., in *Rogers, P. J. v. Shrinivas Gopal*³, remarks tersely that no Court can claim inherent power to alter the judgment of another Court. Dhavle, J., in *Bhutnath Khawas v. Dasrathi Das*⁴, agrees with Beaumont, C.J., in holding that no Court can claim inherent power to alter the judgment of another Court. The Madras High Court in *In re Public Prosecutor*⁵, holds that an appellate Court has power to expunge remarks in a judgment in a suitable case. The Full Bench of the Bombay High Court in *State v. Nilkanth Shirpad*⁶, posed the question thus :

"The important question that arises is whether a superior Court has inherent power to alter the record, as it were, by changing or altering a judgment which has already been delivered and has become final as far as that particular Court is concerned,"

and expressed its view as follows :

"A judgment of a lower Court may be wrong ; it may even be perverse. The proper way to attack that judgment is by bringing it under the scrutiny of the superior Court and getting the judgment of the lower Court judicially corrected.....In our opinion, the inherent power that the High Court possesses is, in proper cases, even though no appeal or revision may be preferred to this Court, to judicially correct the observations of the lower Court by pointing out that the observations made by the Magistrate were not justified or were without any foundation or were wholly wrong or improper."

With respect, I agree with the conclusion arrived at by the Bombay High Court. This judgment, if I may say so with respect, reconciles the doctrine of finality of a judgment and the necessity to give relief in an appropriate case to a person who is not a party to a proceeding, if uncharitable, unmerited and irrelevant remarks are made against him without any foundation whatsoever. The other decisions taking the contrary view infringe the fundamental principle of jurisprudence that judgment made by a Court, however inferior it may be in the hierarchy, is final and it can only be modified in the manner prescribed by the law governing such procedure. All the learned Judges construing the scope of section 561-A of the Code of Criminal Procedure have agreed on one question, namely, to preserve the independence of judicial officers so that they may express their views without fear or favour. The observations made by some of the Judges are apposite in this context. Tek Chand, J., observed in *In the matter of Daly and others*² at page 275:

"It is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without undue interference by this Court."

Chagla, C.J., in *State v. Nilkanth Shirpad*⁶, observed at page 160 :

"It is very necessary, in order to maintain the independence of the judiciary, that every Magistrate, however junior, should feel that he can fearlessly give expression to his own opinion in the judgment which he delivers. If our Magistrates feel that they cannot frankly and fearlessly deal with matters that come before them and that the High Court is likely to interfere with their opinions, the independence of the judiciary might be seriously undermined."

I entirely agree with the remarks. I reiterate that every judicial officer must be free to express his mind in the matter of the appreciation of evidence before him. The

1. (1926) I.L.R. 49 All. 254, 256.

2. (1927) I.L.R. 9 Lahore 269.

3. I.L.R. (1940) Bom. 415, 418.

4. A.I.R. 1941 Pat. 544.

5. I.L.R. (1944) Mad. 614 : (1944) 1 M.L.J. 153 : A.I.R. 1944 Mad. 320.

6. I.L.R. (1954) Bom. 148, 157 (F.B.).

phraseology used by a particular Judge depends upon his inherent reaction to falsehood, his comparative command of the English language and his felicity of expression. There is nothing more deleterious to the discharge of judicial functions than to create in the mind of a Judge that he should conform to a particular pattern which may, or may not be, to the liking of the appellate Court. Sometimes he may overstep the mark. When public interests conflict the lesser should yield to the larger one. An unmerited and undeserved insult to a witness may have to be tolerated in the general interests of preserving the independence of the judiciary. Even so, a duty is cast upon the judicial officer not to deflect himself from the even course of justice by making disparaging and undeserving remarks on persons that appear before him as witnesses or otherwise. Moderation in expression lends dignity to his office and imparts greater respect for judiciary. But occasions do arise when a particular Judge, without any justification, may cast aspersions on a witness or any other person not before him affecting the character of such witness or person. Such remarks may affect the reputation or even the career of such person. In my experience I find such cases are very rare. But if it happens, I agree with the Full Bench of the Bombay High Court that the appellate Court in a suitable case may judicially correct the observations of the lower Court by pointing out that the observations made by the Court were not justified or were without any foundation or were wholly wrong or improper. This can be done under its inherent power preserved under section 561-A of the Code of Criminal Procedure. But that power must be exercised only in exceptional cases where the interest of the party concerned would irrevocably suffer.

From the aforesaid discussion the following principles emerge : (1) A judgment of a criminal Court is final ; it can be set aside or modified only in the manner prescribed by law. (2) Every Judge, whatever may be his rank in the hierarchy, must have an unrestricted right to express his views in any matter before him without fear or favour. (3) There is a correlative and self-imposed duty in a Judge not to make irrelevant remarks or observations without any foundation, especially in the case of witnesses or parties not before him, affecting their character or reputation. (4) An appellate Court has jurisdiction to judicially correct such remarks, but it will do so only in exceptional cases where such remarks would cause irrevocable harm to a witness or a party not before it.

Let me now apply the said principles to the instant case. Here, a bail application was pending before the Magistrate on the ground that the accused were ill. The Magistrate asked the medical officer to report on their health. The said officer sent a report stating that he had examined the accused and that they were suffering from hookworm infection and were anæmic. In the statement of the case the appellant says that he made a clinical examination and also the examination of the stools of the accused ; but he did not send along with his report the result of his clinical examination showing the particulars of the blood and stool tests. The learned Munsif-Magistrate pointed out that no actual examination report was attached to the petition (report) and that it was an extreme case of carelessness on the part of the doctor concerned. The Magistrate felt that as a judicial officer he could not accept the mere *ipsi dixit* of the doctor unsupported by the results of clinical examination to come to a conclusion one way or other whether the accused were really so ill as to be let on bail. In the circumstances, if the Magistrate characterized the act of the medical officer in not sending the detailed report as an act of extreme carelessness, can it be said that his inference was such that the appellate Court should treat it as an exceptional case and judicially correct the said observations? Indeed, the High Court in its judgment said :

"The observation of the learned Munsif-Magistrate does not seem to be wholly unjustified. The doctor should have given the reasons for calling the accused persons on whose behalf bail petitions were moved as anæmic."

It rightly concluded thus :

"In the circumstances, if the Court said that the doctor was careless, I do not think that there is any impropriety in such an observation. It is likely that some other Court may take a different view

of the thing, but that is no ground for upsetting the observations of a Court. To accept this contention would amount to placing unnecessary fetters on the discretion of the Court in assessing any witness or any evidence in course of its judgment or order."

With these observations, it dismissed the petition.

Now, the question is whether in such circumstances this Court in exercise of its powers under Article 136 of the Constitution should interfere with the order of the High Court. Is it such an exceptional case which calls for the interference of this Court? The High Court in exercise of its discretion, for the reasons given by it refused to expunge the remarks. It is certainly not a case meriting the interference of this Court in its extraordinary jurisdiction.

That apart, I entirely agree with the observations of the High Court. A judicial officer does not surrender his judgment in medical matters to the *ipsi dixit* of the doctor. The opinion of a doctor has great weight, provided it is supported by the material on which he formed the opinion. If he does not disclose the particulars of the clinical results, how can the Court come to a conclusion that the accused were so ill as to be released on bail? In the circumstances, the Magistrate said that the doctor was grossly negligent. It is not possible to say that the said observation is either irrelevant or without foundation.

In the result, the appeal fails and is dismissed.

Mudholkar, J., (on behalf of *Raghubar Dayal, J.* and himself).—In this appeal by Special Leave from a judgment of the High Court of Patna the question raised is as to the powers of the High Court under section 561-A of the Code of Criminal Procedure in regard to expunging remarks made in its judgment or order by a Court against a person who is neither a party nor a witness to the proceeding.

The question arises this way. A bail application was moved in the Court of Mr. B. Rai, Munsif-Magistrate, Jahanabad on behalf of two persons who were accused in a criminal case pending in that Court on the ground that they were lying seriously ill in jail. On 3rd October, 1959, the Magistrate passed an order calling upon the Civil Assistant Surgeon at that place, who, we are told, is also Superintendent of the Sub-Jail to report whether the accused persons are ill. On 7th October, 1959 Mr. Sharan, the Civil Assistant Surgeon, signing as the Superintendent of the Sub-Jail submitted the following report :

" Ref : Copy of order sheet, dated 3rd October, 1959

in G.R. 367/59 Ghosi P.S. case 3 (8)/59.

Sir,

Examined accused Ramsewak Dusadh and Ramdeo Dusadh both sons of Dillan Dusadh of village Havellipur P. S. Ghosi, district Gaya and found that both of them are suffering from hookworm infection and are anaemic.

Yours faithfully,

Sd. "

The report was addressed to the Magistrate. On 19th October, 1959 he passed his order releasing the accused persons on bail in the course of which he made certain observations which are sought to be expunged. For some obscure reason the learned Magistrate has regarded what is plainly a report to be a 'petition' and then blamed Dr. Sharan for not realising that a judicial order could be passed only on his report and not "his petition". That is not all. He has found fault with Dr. Sharan because (a) the report appeared to be in the handwriting of some person other than himself and was only signed by him and (b) "no actual examination report was attached with this petition (*sic*)". For these reasons he observed in his order : "It is an extreme case of carelessness on the part of the Doctor concerned" and ordered that a copy of the 'petition' and the order sheet be sent to the Civil Surgeon, Gaya, for information.

The report of Dr. Sharan is couched in the usual form but if the Magistrate felt any doubt about the matter he could well have sought to have it cleared by writing to him for particulars. No doubt, this might have entailed postponement

of the case and thus delayed passing an order. But it would seem that the Magistrate did not really think that the report was inadequate. For, acting upon it, he in fact released the accused persons on bail on the very day, that is, the 19th of October.

All this is, however, very trivial and is not a kind of matter which ought ever to have been brought up before this Court. No doubt the learned Magistrate has said that the doctor was careless and by forwarding a copy of the order straight to his departmental superior indicated that he expected action to be taken on the basis of his remarks. But in view of the fact that the learned Magistrate has in fact acted upon the doctor's report and had wrongly characterised it as a petition his remarks could not reasonably have been regarded by the doctor's superiors as being very serious. No harm, much less any irreparable harm, could therefore be expected to result from these remarks.

Upon this view we would not have said anything further. But, Mr. D. P. Singh, appearing for the State of Bihar has raised an objection to the jurisdiction of the High Court under section 561-A of the Code and since it raises a question of general importance, it is necessary to deal with it. That section reads thus :

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

This provision was introduced in the Code when it was extensively amended in the year 1923. But it does not confer and was not intended to confer any new powers on the High Courts. The Courts exist not only for securing obedience to the law of the land but also for securing the ends of justice in its widest sense. All Courts including the High Courts, can exercise such powers as the laws of the land confer upon them as well as such inherent powers to do justice as are preserved expressly or are not taken away by a statute. We shall confine ourselves to the inherent powers of the High Court in criminal cases. Now, section 561-A says in clear terms that the inherent power of the High Court to do certain things is preserved and what we have to ascertain is whether the power to expunge any passage from the judgment of a subordinate Court is inherent in the High Court and must, therefore, be deemed to have been preserved.

The power of the High Court to expunge remarks from the judgment or order of a subordinate Court while dealing with an appeal from the Court is not questioned by Mr. Singh. In fact expunction of remarks was ordered by this Court in appeal in *The State of U.P. v. J. N. Bagga and others*¹, but there is no discussion in the judgment on the point, as the existence of the power was not challenged. We are not concerned here with the powers of the appellate Court. The question before us is whether the inherent power of the High Court to secure the ends of justice embraces the power to expunge passages from the judgment of a subordinate Court which is independent of its statutory powers to alter, amend or reverse the judgments of subordinate Courts in appeals or revisions before it.

Observations made by a subordinate Court in its judgment or order may very seriously affect, in a given case, only a party thereto in which event he can, if the observations are irrelevant or unjustifiable, seek redress by appeal or revision, whichever of these remedies is available to him at law. But what if a stranger to the proceeding or a lawyer engaged in the case is affected by the Court's remarks of similar character? Has he no remedy? Must he suffer the consequences of irrelevant or unjustifiable remarks of a Court though if similar remarks were made against a party to the proceeding the party is entitled to seek redress? It would be a travesty of justice if an injured stranger to a proceeding should have to suffer unheard as a result of unjustifiable and harmful observations made by a Court against him. The case of an injured stranger would be of a kind in which redress would be possible only if some Court possesses such power and can exercise it to secure the ends of justice. The question is whether the highest Court in a State has and must always

1. CrI.A. No. 122 of 1959, decided on 16th January, 1961.

be deemed to have had such power. The further question is whether the exercise of such power would involve alteration of a judgment or order and if so whether that must be deemed to have been permitted by the Code.

Certain cases were cited at the Bar and we will deal with them in chronological order. The first is *In the matter of H. Daly & others*¹. In that case Tek Chand J., said that the High Court has power to expunge passages from judgments delivered by itself or by subordinate Courts and its power to do so has been put beyond controversy by the enactment of section 561-A in the Code of Criminal Procedure. While coming to this conclusion the learned Judge has referred to five decisions of the Chief Court of Lahore and pointed out that that Court claimed the power to expunge remarks in appropriate cases. It may incidentally be mentioned that he has also referred to the decision in *Panchanan Banerji v. Upendra Nath*², in which it was held that the High Court had inherent power to order deletion of passages which are either irrelevant or inadmissible and which adversely affect the character of persons before the Court. It may, however, be mentioned that that was a case where the learned Judge, Sulaiman J., was dealing with an appeal against acquittal and ordered the expunction of remarks while exercising appellate jurisdiction though he has referred in this connection to the inherent powers of the Court. Neither of these decisions, however, contains any discussion on the point.

Then there is the decision in *Rogers v. Shrinivas Gopal Kawale*³ in which Beaumont, C.J., held that the High Court had no power under section 561-A to expunge passages in judgments which have not been brought before it in regular appeal revision. There, an application was made under section 561-A for expunging certain observations criticising a witness made by the Additional Sessions Judge of Poona in a criminal appeal. Dealing with the application the learned Chief Justice observed :

"It is obvious that, if the jurisdiction exists, its exercise must place the Court in an anomalous position. The Court must go through the record of a case in which it is not called upon to act judicially at the instance of a party who is not aggrieved by the decision, and it may well be that the Court will have to come to a conclusion upon matters not in issue in the proceedings."

He referred to the decision in *Emperor v. C. Dunn*⁴ and *Emperor v. Sidaramaya*⁵, in the first of which it was held that the High Court had no such jurisdiction and in the second it was said that it was doubtful whether such jurisdiction exists in the High Court. He expressed disagreement with the view taken in *Panchanan Banerji's case*², and *Daly's case*¹, and observed :

"With all respect to the learned Judges who have taken a different view, I am quite unable to see how section 561-A affects the question. That section provides that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. So that all that the section does is to preserve the inherent powers of the High Court without conferring any additional power. In my opinion no Court can claim inherent power to alter the judgment of another Court. All powers in appeal and revision are statutory, and not inherent in the superior Court. When once a matter is duly brought before a superior Court, then no doubt inherent powers may be called in aid to enable the Court to do complete justice, but the power to bring a matter in appeal or revision before a superior Court must be conferred by statute or some enactment having statutory effect."

The learned Chief Justice observed that the power of superintendence conferred upon the High Court by section 224 of the Government of India Act over Courts subordinate to it does not enable the High Court to correct a judgment of a subordinate Court and points out that sections 435 and 439, Criminal Procedure Code only enable the High Court to satisfy itself about the correctness, legality or propriety of any finding, sentence or order of an inferior Court or of the regularity of the proceeding before it. Then he observed :

"When the High Court is hearing an application in appeal or revision, the whole matter is before it and it can make any order consequential or incidental to the order under review, and, in my opinion, in such a case the Court is entitled to expunge any remarks in the lower Court's judgment which it thinks ought not to have been made. But it seems to be impossible to say that expunging passages

1. (1927) I.L.R. 9 Lahore 269.

2. (1926) I.L.R. 49 All. 254.

3. I.L.R. (1940) Bom. 415.

4. (1922) 44 All. 401.

5. (1917) 19 Bom.L.R. 912.

from a judgment giving reasons for an order which is not under appeal involves anything consequential or incidental to the matter in appeal. If the Court thinks that any such action is called for, it can itself send for the record and act regularly in revision."

In the end the learned Chief Justice held that the decision in *Emperor v. Dunn*¹ was right and has not been altered by the introduction of section 561-A. This judgment was partially overruled by a Full Bench in *State v. Nilkanath Shripad Bhawe*². Chagla, C.J., who delivered the judgment of the Court concurred with the observation of Beaumont, C.J., that no Court can claim inherent power to alter the judgment of another Court and after pointing out that Beaumont, C.J., had also said in his judgment that the Court had inherent jurisdiction to alter the judgment once the matter comes before it in appeal or revision, said :—

"It is difficult to understand, if the High Court has no inherent jurisdiction to alter the judgment of another Court, how that jurisdiction arises merely because the matter comes before the High Court in appeal or revision. Either the Court has inherent jurisdiction or it has not. If it has inherent jurisdiction, it can be exercised either in appeal or in revision, or, . . . by an independent application made by the party under section 561-A."

The learned Chief Justice then quoted the further observations of Beaumont, C.J., which we have reproduced earlier and said :

"It is difficult to understand how the Court can act regularly in revision if there is no effective order which can be challenged in revision. Therefore, in our opinion this judgment was correctly decided to the extent that it laid down that there was no inherent jurisdiction in a superior Court to alter the judgment of another Court. But to the extent that this Division Bench laid down that the power to judicially correct the judgment of a lower Court only arose in appeals and revisions, it was not correctly decided. The power of the High Court judicially to correct any subordinate Judge exists independently of applications which come before it by way of appeal or revision. This Court can judicially correct any subordinate Judge in any application made to it which it can entertain under section 561-A of the Code."

The learned Chief Justice then referred to an unreported decision of the Bombay High Court in which the view was taken that the Court has jurisdiction to expunge remarks from the judgment of a lower Court although the matter was not before it in appeal or revision and in which the Court expressed difficulty in appreciating the view taken in *Roger's case*³. Then the learned Chief Justice pointed out that he did not find it easy to understand how if, as was said by Beaumont, C.J., the power to alter the judgment of an inferior Court is not an inherent power, it can be brought in aid as an inherent power provided only the matter is before the High Court, in what he has called regular revision. According to the learned Chief Justice in entertaining an application under section 561-A "what the High Court should do is not to expunge remarks but judicially to correct by its judgment the judgment of the lower Court." We also find it difficult to understand what Beaumont, C.J., meant when he said on the one hand that the High Court has no inherent power to alter the judgment of an inferior Court and on the other that when the matter is before the High Court by way of regular revision it can alter the judgment by exercising its inherent power. Either the High Court has inherent power to alter a judgment of a subordinate Court or it has not. If it has no inherent power to do so the mere fact that a regular proceeding arising out of the judgment of the subordinate Court is before it would make no difference. For, even then it cannot do anything as its revisional powers under section 439, Criminal Procedure Code do not enable it to expunge remarks. Yet, according to the learned Chief Justice the High Court can then exercise its inherent power. How it can do so when on the earlier statement of the legal position, it has no such inherent power, is not easy to follow.

We also feel some difficulty in understanding the judgment of Chagla, C.J., when he says that by entertaining an application under section 561-A the High Court can judicially correct the judgment of a subordinate Court but at the same time not expunge remarks therein as doing so would be altering the judgment of the subordinate Court. If the alteration or amendment of the judgment or order of a subordinate Court is not the necessary consequence of the judicial correction of such

1. (1922) 44 All. 401.

2. I.L.R. 1954 Bom. 148 (F.B.).

3. I.L.R. (1940) Bom. 415.

judgment or order we fail to see how removing from it a passage which is not relevant to the controversy decided by the judgment would amount to such alteration. A judgment consists of the verdict of the Court and its reasons bearing on it. If a superior Court supercedes or alters or amends either of these it will be reversing, altering or amending the judgment. But if a document embodying the judgment contains besides the Court's verdict any reasons therefor, any additional matter which is unrelated to either of these two components of the judgment it cannot properly be regarded as a part of the judgment merely because it is contained in the same document. By including within the judgment irrelevant matter the Court cannot make them an integral part of the judgment. The power to delete or order the deletion of such matter for securing the ends of justice must be deemed to inhere in the High Court.

The learned Chief Justice seems to accept the position that under section 561-A an application can be made to the High Court complaining of injurious remarks by a subordinate Court on the ground that they are unjustifiable or irrelevant and that such an application becomes a judicial proceeding before the High Court. He also accepts that the High Court can thereupon correct the judgment of the subordinate Court in appropriate circumstances. If the High Court has power in such a proceeding to correct the judgment or order of a subordinate Court how exactly and when does it exercise it? Earlier in his judgment the learned Chief Justice has said :

"A judgment of a lower Court may be wrong ; it may even be perverse. The proper way to attack that judgment is by bringing it under the scrutiny of the superior Court and getting the judgment of the lower Court judicially corrected. But is it proper for the superior Court to alter or amend the judgment which has already been delivered ? In our opinion, the inherent power that the High Court possesses is, in proper cases, even though no appeal or revision may be preferred to this Court to judicially correct the observations of the lower Court by pointing out that the observations made by the Magistrate were not justified or were without any foundation or were wholly wrong or improper."

It may be mentioned that the Advocate-General who appeared in the case had urged merely making observations of this kind or passing structures on a subordinate Court stands on a different footing from expunging objectionable remarks. The learned Chief Justice observed :

"In our opinion it is not necessary to express the displeasure of this Court against any observations made by a Magistrate or by a Session Judge by expunging the remarks from the judgment delivered by him. . . . In our opinion, therefore, it would not be correct to say that expunging remarks from a judgment or deleting passages from a judgment constitutes the inherent power of any superior Court and, therefore, the inherent power of the High Court."

The learned Chief Justice quite rightly holds that the High Court has inherent power judicially to correct a subordinate Court even for making harmful remarks against a person who is not a party to the proceedings. But, according to him, the sole content of this power consists of expression by the superior Court of its displeasure at the offending remarks. We can discern no principle upon which such a limitation on the inherent powers of the High Court can be justified.

Moreover, mere expression by the High Court of its displeasure at the offending observations of a subordinate Court cannot even be regarded as amounting to "judicial correction" of the error committed by such Court. For, despite the disapprobation, the remarks continue to be there on the record of the subordinate Court. The form normally adopted by a superior Court for "judicial correction" of an error of a subordinate Court does not consist of mere expression of its disagreement with the view taken by the subordinate Court but of effacing that error and thus depriving it of its legal effect. That is precisely what ought to be done with respect to irrelevant remarks of a subordinate Court when they are found to be unjustifiable and harmful. The appropriate form in which this part of the judicial process may be carried out would be either by expunging them or directing them to be expunged so that they would cease to have any effect.

There can be no doubt that the judgment of a Tribunal empowered by law to adjudicate upon and decide any matter affecting the rights of parties is inviolable unless the law allows it to be questioned or interfered with. In such a case the judg-

ment can be challenged only and interfered with only by the specified authority and to the extent permissible by the express provisions of law. No other Court, not even the High Court, unless expressly permitted by law can entertain a challenge or exercise any power with respect to a judgment. Its inherent power is not exercisable for this purpose because what is made final or inviolable by law is beyond the purview of such power. But the inviolability which attaches to a judgment must necessarily be confined to its integral parts; that is the verdict and reasons therefor. It cannot extend to matters which though ostensibly a part of the judgment are not in reality its integral parts. It is because of this that the majority of the High Courts hold that they have always had the power to expunge passages from the judgments of subordinate Courts in certain circumstances. In other words that this power has always been there and can be resorted to for securing the ends of justice. It is significant to note that despite this, though the Code was amended materially in 1955 the Legislature did not indicate in section 561-A or any other provisions that this power did not exist or is taken away. Clearly the High Courts, by expunging remarks from an order or judgment of a subordinate Court would not in any event be altering it on merits or in any matter of substance but be only deleting from it matter which being alien to the matter before the Court ought never to have been there. When such only is the effect of what the High Court does, can prohibition to this course be inferred from the fact that sections 423 and 439 which deal with appellate and revisional powers, are silent about such matters? We are clear that they do not exclude such power. As already stated, expunction of irrelevant remarks does not amount to the alteration or amendment of a judgment or an order of a subordinate Court. No doubt, the exercise of such power will have the effect of taking out of the judgment or order something which was there before and thus in a limited way to interference with the content of the document embodying the judgment or order. But bearing in mind the paramount importance of securing the ends of justice the High Court must be deemed to have such power.

When we speak of the inherent powers of the High Court of a State we mean the powers which must, by reason of its being the highest Court in the State having general jurisdiction over civil and criminal Courts in the State, inhere in that Court. The powers in a sense are an inalienable attribute of the position it holds with respect to the Courts subordinate to it. These powers are partly administrative and partly judicial. They are necessarily judicial when they are exercisable with respect to a judicial order and for securing the ends of justice. When we speak of ends of justice we do not use the expression to comprise within it any vague or nebulous concept of justice, nor even justice in the philosophical sense but justice according to law, the statute law and the common law. Again, this power is not exercisable every time the High Court finds that there has been a miscarriage of justice. For, the procedural laws of the State provide for correction of most of the errors of subordinate Courts which may have resulted in miscarriage of justice. These errors can be corrected only by resorting to the procedure prescribed by law and not otherwise. Inherent powers are in the nature of extraordinary powers available only where no express power is available to the High Court to do a particular thing and where its express powers do not negative the existence of such inherent power. The further condition for its exercise, in so far as cases arising out of the exercise by the subordinate Courts of their criminal jurisdiction are concerned is that it must be necessary to resort to it for giving effect to an order under the Code of Criminal Procedure or for preventing an abuse of the process of the Court or for otherwise securing the ends of justice.

The power to expunge remarks is no doubt an extraordinary power but nevertheless it does exist for redressing a kind of grievance for which the statute provides no remedy in express terms. The fact that the statute recognizes that the High Courts are not confined to the exercise of powers expressly conferred by it and may continue to exercise their inherent powers makes three things clear. One, that extraordinary situations may call for the exercise of extraordinary powers. Second, that the High Courts have inherent power to secure the ends of justice. Third,

that the express provisions of the Code do not affect that power. The precise powers which inhere in the High Court are deliberately not defined by section 561-A for good reason. It is obviously not possible to attempt to define the variety of circumstances which will call for their exercise. No doubt, this section confers no new power but it does recognize the general power to do that which is necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. But then, the statute does not say that the inherent power recognized is only such as has been exercised in the past either. What it says is that the High Courts always had such inherent power and that this power has not been taken away. Whenever in a criminal matter a question arises for consideration whether in particular circumstances the High Court has power to make a particular kind of order in the absence of express provision in the Code or other statute the test to be applied would be whether it is necessary to do so to give effect to an order under the Code or to prevent the abuse of the process of the Court or otherwise to secure the ends of justice.

When the question arises before the High Court in any specific case whether to resort to such undefined power it is essential for it to exercise great caution and circumspection. Thus when it is moved by an aggrieved party to expunge any passage from the order or judgment of a subordinate Court it must be fully satisfied that the passage complained of is wholly irrelevant and unjustifiable, that its retention on the records will cause serious harm to the person to whom it refers and that its expunction will not affect the reasons for the judgment or order.

This aspect of the matter has been emphasised by Chagla, C.J., in the aforesaid case and we have no doubt that it is very necessary in order to maintain the independence of the judiciary that every presiding officer of a criminal Court however junior, should feel that he can fearlessly give expression to his views in the judgment or order which he delivers and that no impression should be allowed to be created in the mind of the presiding officer that the High Court is likely to interfere lightly with his opinions. For, otherwise, his independence will be seriously undermined.

To sum up, every High Court as the highest Court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of securing the ends of justice. This power extends to expunction or ordering expunction of irrelevant passages from a judgment or order of a subordinate Court and would be exercised by it in appropriate cases for securing the ends of justice. Being an extraordinary power it will, however, not be pressed in aid except for remedying a flagrant abuse by a Subordinate Court of its powers such as by passing comment upon a matter not relevant to the controversy before it and which is unwarranted or is likely to harm or prejudice another.

In the case before us, as we have already indicated, the remarks are not such as are likely to cause harm to the appellant nor are such as should cause any harm to him. We, therefore, hold that this is not a fit case for the exercise of the extraordinary power of the High Court under section 561-A. For these reasons we dismiss the appeal.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA,
J.G. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The Associated Industries (P.) Ltd.

Appellant*

The Regional Provident Fund Commissioner, Kerala,
Trivandrum

Respondent.

Employees' Provident Funds Act (XIX of 1952), section 1 (3)—Scope—Company running tile factory and engineering works—If falls within section 1 (3).

If the factory carries on one industry which falls under Schedule I and satisfies the requirement as to the number of employees prescribed by the section it clearly falls under section 1 (3) (a) of the Employees' Provident Funds Act. If the factory carries on more than one industry all of which fall under Schedule I and its numerical strength satisfies the test prescribed in that behalf, it is an establishment under section 1 (3) (a). If a factory runs more industries than one, one of which is the primary and the dominant industry and the others are its feeders and can be regarded as subsidiary, minor, or incidental industries in that sense then the character of the dominant and primary industry will determine the question as to whether the factory is an establishment under section 1 (3) (a) or not. If the dominant and primary industry falls under Schedule I, the fact that the subsidiary industries do not fall under Schedule I will not help to exclude the application of section 1 (3) (a). If the dominant and primary industry does not fall under Schedule I, then section 1 (3) (a) will not apply. If the factory runs more industries than one all of which are independent of each other and constitute separate and distinct industries section 1 (3) (a) will apply to the factory even if one or more, but not all, of the industries run by the factory fall under Schedule I. The question about the subsidiary, minor, or feeding industries can legitimately arise only where it is shown that the factory is really started for the purpose of running one primary industry and has undertaken other subsidiary industries only for the purpose of subserving and feeding the purposes and objects of the primary industry; in such a case these minor industries merely serve as departments of the primary industry; otherwise if the industries run by a factory are independent, or are not so integrated as to be treated as part of the same industry, the question about the principal and the dominant character of one industry as against the minor or subsidiary character of another industry does not fall to be considered.

Section 1 (3) (a) applies to a company which carries on tiles industry and an engineering industry within the same premises and as part of the same establishment and under the same licence.

Appeal from the Judgment and Decree dated 8th August, 1960, of the Kerala High Court in O.P. No. 97 of 1953.

G.P. Pai, Advocate and J.B. Dadachanji, O.C. Mathur and Ravinder Narain, Advocates of M/s. J.B. Dadachanji & Co., for Appellant.

S.V. Gupte, Additional Solicitor-General of India, (R. Ganapathy Iyer, Advocate and P.D. Menon, Advocate for R.H. Dhebar, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short question which arises in this appeal is whether the factory run by the appellant, the Associated Industries (P.) Ltd., Quilon, falls within section 1 (3) of the Employees' Provident Funds Act, 1952 (XIX of 1952) (hereinafter called the Act). The appellant is a Company which runs a tile factory and an engineering works at Quilon. The tile factory began its career in July, 1943, and the engineering works in September, 1950. It is common ground that these two industries are separate and distinct and that they are carried on by the same Company and on the same premises. It is also common ground that a licence issued under the Factories Act, 1948, has been issued to the appellant for the entire premises and it is under this licence that the said premises are allowed to be used as one factory under the said Act and the Rules framed thereunder.

It appears that the respondent, the Regional Provident Fund Commissioner, Vanchiyoor, Trivandrum, intimated to the appellant on 10th March, 1953, that the Act as well as the scheme framed under it were applicable to the appellant's factory, and so, the appellant was called upon to deposit in the Sub-Office of the Imperial Bank of India the contributions and administrative charges as required

by section 6 of the Act. The same requisition was repeated on 25th March, 1953, and 24th April, 1953. The appellant disputed the correctness of the view taken by the respondent that the appellant's factory fell under the purview of the Act, and so, it refused to comply with the respondent's requisition. Thereupon, the respondent wrote to the appellant on 16th June, 1953, informing it that appropriate action would be taken to compel the appellant to make the necessary deposit and submit returns as required by the Act in case it failed to comply with the notices issued in that behalf. At this stage, the appellant moved the High Court of Kerala by a Writ Petition (O.P. No. 97 of 1953) in which it claimed a writ of *certio ari* quashing the notices issued by the respondent against it, and restraining the respondent from proceeding further in the matter and for other incidental reliefs.

The main contention raised by the appellant before the High Court was that the appellant's factory was not an establishment to which section 1 (3) of the Act applied. The High Court has rejected this contention. Then it was urged before the High Court on behalf of the appellant that the effect of the notices served on the appellant by the respondent was retrospective in character and it was urged that the said notices were illegal. This argument was also rejected by the High Court. The appellant further contended before the High Court that since for the relevant period the employees had not made their contributions, it would be inequitable to enforce the notices against the appellant. The High Court noticed the fact that it had been conceded by the respondent that he did not propose to collect the employees' share of the contribution to the fund for the relevant period from the appellant, and it held that the concession so made was proper and fair and so, there was no substance in the grievance made by the appellant that giving effect to the notices served on it by the respondent would be inequitable and unjust. On these findings, the Writ Petition filed by the appellant was dismissed with costs. It is against this order that the appellant has come to this Court with a certificate granted by the High Court.

The principal point which is sought to be raised by Mr. Pai on behalf of the appellant in this appeal is concluded by a recent decision of this Court in *The Regional Provident Fund Commissioner, Bombay v. (1) Shree Krishna Metal Manufacturing Co., Bhandara and (2) Oudh Sugar Mills Ltd.*¹ It would be noticed that the relevant sections which fell to be construed in dealing with the appellant's contention are section 1 (3), section 2 (g) and (i) and section 6 of the Act. Section 1 (3) (a) provides, *inter alia*, that subject to the provisions contained in section 16, the Act applies to every establishment which is a factory engaged in any industry specified in Schedule I and in which 50 or more persons are employed; the numerical requirement of 50 has been reduced to 20 by an Amending Act of 1960. Section 2 (g) defines a 'factory' as meaning any premises, including the precincts thereof, in any part of which a manufacturing process is being carried on or is ordinarily so carried on, whether with the aid of power or without the aid of power; and section 2 (i) defines an 'industry' as meaning any industry specified in Schedule I, and includes any other industry added to the Schedule by notification under section 4. Section 6 prescribes for the levy of contributions and deals with other matters which may be provided for in Schemes; and in accordance with the provisions of this section, the Employees' Provident Fund Scheme of 1952 has been framed.

In the case of *The Regional Provident Fund Commissioner, Bombay*¹, this Court has held that section 1 (3) (a) does not lend itself to the construction that it is confined to factories exclusively engaged in any industry specified in Schedule I. It was observed in that connection that when the Legislature has described factories as factories engaged in any industry, it did not intend that the said factories should be exclusively engaged in the industry specified in Schedule I. Consistently with this view, this Court further observed that the word 'factory' used in section 1 (3) (a) has a comprehensive meaning and it includes premises in which any manufacturing process is being carried on as described in the definition, and so the factory

engaged in any industry specified in Schedule I does not necessarily mean a factory exclusively engaged in the particular industry specified in the said Schedule. In construing the scope of section 1 (3) (a) this Court held that composite factories came within its purview and that the fact that a factory is engaged in industrial activities some of which fall under the Schedule and some do not, will not take the factory out of the purview of section 1 (3) (a).

Having dealt with this aspect of the matter, this Court proceeded to consider the question as to whether numerical requirement of the employment of 50 persons, as the section then stood, applied to the factory or to the industry, and it held that the said test applied not to the industry but to the factory. Thus, the conclusion was that in order that a factory should fall under section 1 (3) (a), it must be shown that it is engaged in any such industry as is specified in Schedule I, and the number of its employees should not be less than 50.

This decision makes it clear that section 1 (3) (a) is not confined only to factories which are exclusively engaged in industrial work to which Schedule I applies, but it also takes in composite factories which run industries some of which fall under Schedule I and some do not. In order to make the position clear let us state the true legal position in respect of the scope of the application of section 1 (3) (a) in categorical terms. If the factory carries on one industry which falls under Schedule I and satisfies the requirement as to the number of employees prescribed by the section, it clearly falls under section 1 (3) (a). If the factory carries on more than one industry all of which fell under Schedule I and its numerical strength satisfies the test prescribed in that behalf, it is an establishment under section 1 (3) (a). If a factory runs more industries than one, one of which is the primary and the dominant industry and the others are its feeders and can be regarded as subsidiary, minor or incidental industries in that sense, then the character of the dominant and primary industry will determine the question as to whether the factory is an establishment under section 1 (3) (a) or not. If the dominant and primary industry falls under Schedule I, the fact that the subsidiary industries do not fall under Schedule I will not help to exclude the application of section 1 (3) (a). If the dominant and primary industry does not fall under Schedule I, but one or more subsidiary, incidental, minor and feeding industries fall under Schedule I, then section 1 (3) (a) will not apply. If the factory runs more industries than one all of which are independent of each other and constitute separate and distinct industries, section 1 (3) (a) will apply to the factory even if one or more, but not all, of the industries run by the factory fall under Schedule I. The question about the subsidiary, minor, or feeding industries can legitimately arise only where it is shown that the factory is really started for the purpose of running one primary industry and has undertaken other subsidiary industries only for the purpose of subserving and feeding the purposes and objects of the primary industry; in such a case, these minor industries merely serve as departments of the primary industry, otherwise if the industries run by a factory are independent, or are not so integrated as to be treated as part of the same industry, the question about the principal and the dominant character of one industry as against the minor or subsidiary character of another industry does not fall to be considered.

It is in the light of this position that we may revert to the actual decision in *The Regional Provident Fund Commissioner, Bombay*¹. In that case, this Court was dealing with the cases of Shree Krishna Metal Manufacturing Co., and Oudh Sugar Mills Ltd. The Metal Company carried on four different kinds of activities and it was held that its industrial activity which fell under Schedule I was neither minor, nor subsidiary, nor incidental to the other activities. In other words, the industry which the company ran and which fell under Schedule I was independent of the other industries conducted by the Company, and so, it was held that the question about one industry being subsidiary, minor, or incidental did not arise. In the result, the Company's factory was found to fall under section 1 (3) (a).

On the other hand, the case of the Oudh Sugar Mills stood on a different basis. The primary activity of the mills was the manufacture of hydrogenated vegetable oil named 'Vanasada' and its by-products, such as soap, oil-cakes, etc. It appeared that a department of the Mills manufactured containers and this part of the industrial activity of the Mills fell under Schedule I. Evidence, however, showed that the fabrication of the containers had been undertaken by the Mills only as a feeder activity which was integrally connected with its primary business of producing and marketing vegetable oil, and since the primary business was outside Schedule I the factory as a whole was held to be outside section 1 (3) (a).

It is true that since this Court dealt with the two respective cases of the Company and the Mills in one judgment, the test as to the principal character of the industrial activity of one industry in relation to the character of the minor industry came to be considered; but the application of the said test became necessary essentially because of the case of the Oudh Sugar Mills. In the case of the Company, however, the several activities were not minor or subsidiary, but were independent and it was held that the factory of the company fell under section 1 (3) (a). Therefore, in our opinion, there is no scope for the argument in the present case that the engineering industry which the appellant runs is not the primary or dominant industry but the manufacture of tiles is. Mr. Pai attempted to argue that though engineering industry run by the appellant's factory falls under Schedule I, it employs only 24 workers, whereas the tiles industry employs more than 50. He also relied on the fact that the tiles factory was started in 1943 and the engineering works in 1950, and his argument was that judged in the light of the fact that the tiles industry was started first, as well as considered by the application of the test of the strength of the employees working in the two industries, tiles industry should be treated to be the main, dominant and primary industry of the factory, and so, the factory, as a whole, should be held to be outside section 1 (3) (a). In our opinion, this argument is plainly untenable. If the tiles industry and the engineering industry are independent of each other, then no question arises as to which is principal and which is subsidiary. As soon as it is shown that the factory is carrying on two industries independent of each other one of which falls under Schedule I, it becomes a composite factory to which section 1 (3) (a) applies. When, section 1 (3) (a) requires that the factory should be engaged in any industry specified in Schedule I, considerations as to whether the industrial activity is major or minor can arise only, where some activities are dominant and others are of the nature of feeding activities, but not otherwise. Where the industrial activities are independent and the factory is running separate industries within the same premises and as part of the same establishment and under the same licence, it is difficult to accept the argument that in dealing with such a factory, enquiry would be relevant as to which of the industries is dominant and primary, and which is not. Therefore, in our opinion, the High Court was plainly right in rejecting the appellant's case that its factory did not attract the provisions of section 1 (3) (a) of the Act.

Mr. Pai wanted to contend that if the appellant's factory is treated as falling under section 1 (3) (a), complications may arise by reason of the fact that the rate of contribution initially prescribed by section 6 has been amended in 1962 by the Amending Act XLVIII of 1962. Section 6 of the unamended Act provides, *inter alia* that the contribution to be paid by the employer to the fund shall be $6\frac{1}{4}$ per cent. of the basic wages, dearness allowance and retaining allowance, if any, for the time being payable to each of the employees, and the employees' contribution shall be equal to the contribution payable by the employer in respect of him. This section further provided that the employee was competent to make a higher contribution not exceeding 8 and one-third per cent. of his emoluments specified in the said section. By the amendment made in 1962, this rate has been enhanced to 8 per cent. in respect of any establishment or class of establishments which the Central Government, after making such enquiry as it deems fit, may by notification in the Official Gazette specify. We were told that in regard to the engineering industry, this amended sub-section has been extended by a notification, and Mr. Pai's apprehen-

sion is that if the factory of the appellant is held to be an establishment to which section 1 (3) (a) applies on the ground that it is a composite factory which runs several industries one of which falls under Schedule I, it is likely that the increased rate may be made applicable to the factory as a whole. We ought to add that Mr. Pai conceded that subsequent to the decision of the appellant's writ petition in the High Court, the tiles industry has also been included in Schedule I, but the revised rate has been made applicable to it. Mr. Pai contends that if the factory is treated as falling under section 1 (3) (1), a distinction should be made in the different industries run by the factory for the purpose of calculating the contribution of the employer to the Provident Fund. We do not propose to deal with this contention in the present appeal. That is a matter which may well have to be decided by the respondent, and it is not open to Mr. Pai to request this Court to decide such a hypothetical question in the present proceedings.

The result is, the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

Industrial Disputes—Revision of wage structure—Principles—Adjustment—Factors—Interim arrangement pending final settlement of dispute—Need to adhere to the agreement—Leave Rules—Employees' State Insurance Act, 1948—Benefit under, if affects leave rules—Applicability of Leave Rules under Delhi Shops and Establishment Act, 1954 to all workmen—Gratuity—Workman dismissed for misconduct—Deprivation of gratuity—Not proper—Retirement age—Fixation by the Tribunal—Principles	1
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TRIBUTE TO THE MEMORY OF JAWAHARLAL NEHRU.

BEFORE THE COMMENCEMENT OF THE BUSINESS OF THE SUPREME COURT FOR THE NEW TERM ON 20TH JULY, 1964, THE CHIEF JUSTICE OF INDIA ON BEHALF OF THE JUDGES OF THE SUPREME COURT PAID THE FOLLOWING TRIBUTE TO THE MEMORY OF JAWAHARLAL NEHRU.

Mr. Attorney-General and members of the Bar,

Before we begin the business of the Court for the new term to-day, it is our painful duty to express our profound sense of sorrow at the death of India's first Prime Minister, Jawaharlal Nehru, which took place in New Delhi on the 27th of May, 1964. With the departure of Nehru from the Indian scene, a 'glorious epoch in the history of Modern India has come to an end.

Born in affluent circumstances and brought up and educated in accordance with the best contemporary aristocratic tradition, when Nehru joined the Allahabad Bar, it seemed that his future career was set to the pattern which convention usually prescribed for brilliant young intellectuals belonging to his class. Providence had, however, willed otherwise ; and so, the young impressionable and impetuous Nehru came into close contact with Gandhiji, the sage of Sabarmati, who had meanwhile appeared on the political horizon of India and had begun to preach his revolutionary doctrine of truth, non-violence, non-attachment and non-co-operation. Thus began the relationship of teacher and disciple between Gandhiji and Nehru which was destined to have such a significant and far-reaching impact on the history of India.

Gandhiji and Nehru differed in many ways and in several areas of thought, their approach was not the same, and that occasionally gave rise to a stimulating dialogue between them in the form of correspondence which served to educate public opinion, but both of them passionately shared a living faith in two basic ideas ; Nehru, like Gandhiji, was ruthlessly determined to bring to a speedy end foreign rule in India which crippled her growth and development, and to usher in Swaraj ; and Nehru, like Gandhiji, was completely dedicated to the service of the poor and hungry millions of India whom Gandhiji in his characteristic style preferred to describe as '*Daridra Narayan*'.

This fundamental unity in their basic postulates bound the teacher and the disciple together ; the teacher showered boundless affection on his disciple and the disciple returned the teacher's love with infinite reverence. Verily, this spiritual relationship between Gandhiji and Nehru is in many ways unique in the history of mankind.

Under Gandhiji's inspiring lead the Nation soon engaged itself in an unceasing non-violent struggle against the British bureaucracy, and in this struggle, Nehru consistently occupied his accustomed place of honour. During this heroic epoch of the national struggle for independence, Nehru's personal life was completely transformed and his ideology went through a revolutionary change. He gave up the comforts of daily life, abandoned his intended plan of pursuing the profession of law and whole-heartedly dedicated himself to the cause of public service ; the call of '*Tyag*' (sacrifice) and '*Seva*' (service) proved irresistible in his case. Ultimately, with the dawn of political freedom on the 15th August, 1947, the epoch of Gandhiji, the Father of the Nation, came to an end with a sense of proud fulfilment, and then began the era of Nehru, the Maker of Modern India.

The most significant contribution that Nehru and his illustrious colleagues made to help the steady and unfailing growth and development of democracy in a free India was the drawing up of the Constitution which was adopted on the 26th January, 1950. The Constitution with just pride proclaimed that the cherished goal of Free India was to guarantee to all its citizens justice, political, social and economic, and It ordained that the Nation's march towards the attainment of this ideal would be by democratic process. Inevitably, the Constitution proceeded to give a place of pride

to the fundamental rights of citizens enshrined within its Articles and simultaneously made appropriate, rational and harmonious provisions under which the said valued rights could be reasonably adjusted with the competing claims of socio-economic justice. The adoption of the democratic process for the establishment of the egalitarian Welfare State is the most distinguishing feature of the Nehru era.

This democratic process postulates the paramount importance of the Rule of Law, and so, under the Constitution, the Supreme Court and the High Courts were constituted as the custodians of the fundamental rights of Indian citizens, and it became their sacred duty to safeguard these fundamental rights and to keep an unceasing vigil on all legislative acts and executive actions in order to ensure that the Statutes passed by the Legislatures and the actions taken by the Executive in pursuance of them, strictly conformed to the relevant provisions of the Constitution. The Judiciary in India has ever since been faithfully and fearlessly discharging the sacred task which has been entrusted to it by the Constitution.

Judicial process is sometimes apt to be slow, prolonged and tardy and it is likely to create impatience in minds which are keen on achieving socio-economic objectives without delay. Even so, Nehru never wavered in his firm conviction that ultimately, the Rule of Law is the only firm and solid basis for the democratic way of life, and so, he consistently recognised the significance and importance of the work that the Judiciary has to perform in the context of the democratic way of life.

Firm belief in the paramount necessity of adopting a rational and scientific approach in the discussion and solution of all secular socio-economic problems ; passionate adherence to the doctrine of secularism which refuses to recognise the relevance or materiality of the citizens' religion in the realm of socio-economic matters of public importance ; undying faith in the unity and integrity of India and in the absolute equality of all her citizens whatever language they speak, whichever religion they follow and whatever caste or creed or region they belong to, and unwavering, steadfast, relentless determination to pursue the democratic way of life ; these basic concepts can broadly be regarded as the distinguishing features of the progressive socio-legal philosophy which Nehru continuously preached and practised throughout his life. There is no doubt that it is by adhering to these principles faithfully in action that the country would perpetuate the memory of Nehru.

On this solemn occasion, this Court fervently resolves in a spirit of humility that the rational and appropriate way in which the brotherhood of law consisting of Lawyers and Judges can pay their homage to the memory of Nehru is to re-dedicate themselves to the mighty task of sustaining and upholding the majesty of the Rule of Law. We must all remember that for the successful operation of the Rule of Law, Judges must act fairly, impartially, objectively and without fear and favour, and Lawyers must whole-heartedly assist the Judges in the administration of justice by conforming to the highest and the best ethical traditions of the profession which require that they must be independent, fearless and efficient, and must never depart from the strict path of rectitude, honesty and integrity in their work. Let us then devote ourselves to the discharge of our respective functions and duties in a spirit of complete co-operation, for that is the best way to honour the memory of Jawaharlal Nehru.

May Nehru's soul rest in peace.

[SUPREME COURT.]

*K. Subba Rao, K.C. Das Gupta, and
Raghubar Dayal, JJ.
3rd March, 1964.*

*Karamshi Jethabhai Somayya v.
State of Bombay
(now Maharashtra).
C.A. No. 552 of 1962.*

Bombay Irrigation Act, 1879—Government of India Act, (1935), section 175 (3).

“Can it be said that in the present case Exhibits D-67 and D-68 disclose that the Superintending Engineer was authorised to enter into a contract of the nature mentioned therein on behalf of the Provincial Government and that the contract was expressed to be made in the name of the Governor? Nothing has been placed before us to establish that the Superintending Engineer was legally authorised to enter into such a contract on behalf of the Government; nor do the documents *ex facie* show that the agreement was expressed to be made in the name of the Provincial Government. The letters mentioned the name of the Minister of the Public Works Department and also the Government, in the context of the rates that might be fixed thereafter, but the said documents did not purport to emanate from the Governor. At best they were issued under the directions of the Minister. We find it difficult to stretch the point further, as such a construction will make the provision of section 175 (3) of the Government of India Act, 1935, nugatory. We cannot, therefore, hold that either the contract was entered into by the person legally authorized by the Government to do so or expressed to be made in the name of the Governor. The agreement is void, as it has not complied with the provisions of section 175 (3) of the Government of India Act, 1935.”

M.K. Nambiar, Senior Advocate, (J.B. Dadachanji, O.C. Mathur and Ravinder Narain, Advocates of Messrs. J.B. Dadachanji & Co., with him), for Appellant.

D.R. Prem, Senior Advocate, (B.R.G.K. Achar and R.H. Dhebar, Advocates, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P.B. Gajendragadkar, C.J., K.N. Wanchoo,
J.C. Shah, N. Rajagopala Ayyangar
and S. M. Sikri, JJ.
4th March, 1964.*

*N. Vajrapani Naidu v.
New Theatres Carnatic
Talkies, Ltd.
C.A. No. 264 of 1962.*

Madras City Tenants' Protection Act (III of 1922) as amended by Madras Act (XIX of 1955), Articles 19 and 31 of the Constitution.

By Majority:—It was urged, however, that by the statute as amended by the Madras City Tenants' Protection (Amendment) Act VI of 1926 (before it was amended by Act XIII of 1960), the price which the Court may fix and at which the tenant is entitled to purchase the land is to be the lowest market value prevalent within seven years preceding the date of the order. This, it was submitted, was unreasonable. But it is not necessary for the purpose of this case to decide that question, for the Company has offered to pay the market value of the land as at the date on which the order was passed by Panchapakesa Iyer, J. That absolves us from the necessity to adjudicate upon the reasonableness of the provisions relating to payment of compensation at the rate prescribed by the Act as amended by Act VI of 1926. We may observe that by the Amending Act XIII of 1960 several alterations have been made as regards the extent of the right of the tenants to require the landlords to sell the land and the price which has to be paid by the tenants for purchasing the land. For instance, under the Amending Act the Court may direct sale only of the minimum area of land necessary for convenient enjoyment by the tenant of the house built by him and the price is to be the average market

value in the three years immediately preceding the date of the order. In view of this amendment, and having regard to the special circumstances, *viz.* the offer made by the Company, notwithstanding the provisions of the Act, to pay the market value of the land at the date of the order, we decline to enter upon an academic consideration as to the validity of the provision fixing compensation at the lowest market value prevalent within seven years preceding the date of the order. Assuming that a provision fixing such compensation is unreasonable and therefore invalid, it would be clearly severable from the rest of the statute and would not affect the validity of the provision relating to acquisition by the tenant of the land demised by purchasing it from the landlord. At best, the landlord would be entitled to obtain compensation which is equivalent to the market value, and that the Company has agreed to pay. That, however, is a matter on which we express no opinion.

A.V. Viswanatha Sastri, Senior Advocate, (*R. Ganapathy Iyer*, Advocate, with him), for Appellants.

M. C. Setalvad, Senior Advocate, (*M. A. Sattar Sayeed* and *R. Thiagarajan*, Advocates, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

K. Subba Rao, *K.C. Das Gupta* and
Raghubar Dayal, JJ.
4th March, 1964.

Dhirendra Nath Gorai v.
Sudhir Chandra Ghosh.
C. As. Nos. 85 and 86 of 1961.

Bengal Money Lenders Act (X of 1940), section 35—Order 21 rules 64, 66 and 91, Civil Procedure Code (V of 1908).

The right under section 35 of the Bengal Money Lenders Act, 1940 is intended only for the benefit of the judgment-debtor and, therefore, he can waive that right.

If that be the legal position, Order 21, rule 90 of the Code of Civil Procedure is immediately attracted. The concurrent finding of the Courts below is that by reason of the non-observance of the provisions of section 35 of the Money Lenders Act no substantial injury was caused to the judgment-debtor. Further, though notice was given to the judgment-debtor, in one case he did not file objections at all and in the other case, though the judgment-debtor filed objections, he did not attend at the drawing up of the proclamation. The sales are, therefore, not liable to be set aside under the terms of the said provision.

B. Sen, Senior Advocate, (*P. K. Ghosh*, Advocate, with him), for Appellants (In both the Appeals).

Sukumar Ghose, Advocate, for Respondents Nos. 12 and 13 (In C.A. No. 85 of 1961) and Respondent No. 9 (In C.A. No. 86 of 1961).

G.R.

Appeals allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., *K.N. Wanchoo*,
J.C. Shah, *N. Rajagopala Ayyangar*
and *S.M. Sikri*, JJ.
5th March, 1964.

Raja Bira Kishore Deb, Hereditary Superintendent, Jagannath Temple, Puri *v.*
State of Orissa.
C.A. No. 195 of 1962.

Shri Jagannath Temple Act (II of 1955), Articles 14, 19, 26, 27, 28 and 31 of the Constitution—The Puri Shri Jagannath Temple (Administration) Act (XIV of 1952)—Orissa Hindu Religious Endowments Act (II of 1952).

The Jagannath temple holds a unique position amongst the Hindu temples in State of Orissa and no other temple can be regarded as comparable with it and Jagannath Temple Act II of 1955 cannot be struck down under Article 14

of the Constitution of India. The Act has only deprived the appellants Adya sevakas of their right to the sole management of the temple which carried no beneficial enjoyment of any property with it and has conferred that management on a committee of which he still remains the chairman. In view of this clear dichotomy in the rights of the appellant and his predecessors there is no question of Article 31 (2) applying in the present case at all, in so far as this right of superintendence of the appellant is concerned. The attack on the constitutionality of the Act on the ground that the sole right of superintendence has been taken away from the appellant and that is hit by Article 19 (1) (f) or Article 231 (2) must therefore fail.

One aspect is the provision of materials and so on for the purpose of the sevapuja. This is a secular function. The other aspect is that after materials etc. have been provided, the sevaks or other persons who may be entitled to do so, perform the sevapuja and other rites as required by the dictates of religion. Clause (1) of section 15 has nothing to do with the second aspect, which is the religious aspect of sevapuja; it deals with the secular aspect of the sevapuja and enjoins upon the committee the duty to provide for the proper performance of sevapuja and that is also in accordance with the record of rights. So that the committee cannot deny materials for sevapuja if the record of rights says that certain materials are necessary. We are clearly of the opinion that clause (1) imposes a duty on the committee to look after the secular part of the sevapuja and leaves the religious part thereof entirely untouched. Further under this clause it will be the duty of the committee to see that those who are to carry out the religious part of the duty do their duties properly. But this again is a secular function to see that sevaks and other servants carry out their duties properly; it does not interfere with the performance of religious duties themselves. The attack on this provision that it interferes with the religious affairs of the temple must therefore fail.

M.C. Setalvad and Sarjoo Prasad, Senior Advocates, (*A.D. Mathur*, Advocate with them), for Appellant.

S.V. Gupte, Additional Solicitor-General of India, (*M.S.K. Sastri* and *R.N. Sachthey*, Advocates, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., K.N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar
and *S. M. Sikri, JJ.*
5th March, 1964.

B. Rajagopala Naidu v.
State Transport Appellate
Tribunal, Madras.
C.A. No. 19 of 1964.

Motor Vehicles Act (IV of 1939), section 43-A—Madras Amendment Act XX of 1948.

On a fair and reasonable construction of section 43-A, of the Motor Vehicles Act it ought to be held that the said section authorises the State Government to issue orders and directions of a general character only in respect of administrative matters which fall to be dealt with by the State Transport Authority or Regional Transport Authority under the relevant provisions of the Act in their administrative capacity.

As this Court has often emphasised, in constitutional matters it is of utmost importance that the Court should not make any *obiter* observations on points not directly raised before it for its decision. Therefore, in indicating the possible alternatives which may be adopted if the State Government thinks that the marking system helps the administration of the Act, we should not be taken to have expressed any opinion on the validity of any of the courses specified.

It would, we think, be idle, to suggest that any Transport Authority functioning in the State would normally refuse to comply with the order issued by the State Government itself. Therefore, we have no hesitation in holding that the decision of the Appellate Tribunal is based solely on the provisions of the impugned order

and since the said order is invalid, the decision itself must be corrected by the issue of a writ of *certiorari*.

S. Mohan Kumara mangalam, Senior Advocate, (*M.N. Rangachari*, Advocate, and *R. K. Garg* and *M.K. Ramamurthi*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Appellant.

R. Ganapathy Iyer, Advocate, for Respondents Nos. 2 and 3.

A. Ranganadham Chetty, Senior Advocate, (*A.V. Rangam*, Advocate, with him), for Respondent No. 4.

M. C. Setalvad, Senior Advocate (*N. G. Krishna Iyengar*, Advocate, and *Onkar Ghand Mathur*, Advocate, of *M/s. J.B. Dadachanji & Co.*, with him), for Intervener.

G.R.

Appeal allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., *K.N. Wanchoo*,
J.C. Shah, *N. Rajagopala Ayyangar*
and *S. M. Sikri*, JJ.
6th March, 1964.

Girdharilal Bansidhar v.
Union of India.
C.A. No. 318 of 1962.

Sea Customs Act (VIII of 1878), sections 167 (8) and 183—*Jurisdiction of High Court under Article 226.*

A Court dealing with a petition under Article 226 is not sitting in appeal over the decision of the Customs Authorities and therefore the correctness of the conclusion reached by those authorities on the appreciation of the several items in the Hand-book or in the Indian Tariff Act which is referred to in these items, is not a matter which falls within the writ jurisdiction of the High Court. There is, here, no complaint of any procedural irregularity of the kind which would invalidate the order, for the order of the Collector shows by its contents that there has been an elaborate investigation and personal hearing accorded before the order now impugned was passed.

Purshottam Trikamdas, Senior Advocate (*M.V. Goswami* and *B. C. Misra*, Advocates, with him), for Appellant.

W.S. Barlingay, Senior Advocate, (*R. H. Dhebar*, Advocate, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., *K.N. Wanchoo*,
J.C. Shah, *N. Rajagopala Ayyangar*
and *S. M. Sikri*, JJ.
6th March, 1964.

Penu Balakrishna Iyer v.
Ariya M. Ramaswami Iyer.
C.A.No. 79 of 1962.

Constitution of India (1950), Article 136—*Special Leave to appeal against the judgment of Single Judge of the Madras High Court without leave to file a Letters Patent Appeal—If competent.*

The true position is that in a given case, if the respondent brings to the notice of this Court facts which would justify the Court in revoking the leave already granted, this Court would, in the interests of justice, not hesitate to adopt that course. Therefore, the question which falls to be considered is whether the present appeal should be dismissed solely on the ground that the appellants did not apply for leave under the relevant clause of the Letters Patent of the Madras High Court.

Having regard to the wide scope of the powers conferred on this Court under Article 136, it is not possible and indeed, it would not be expedient, to lay down any general rule which would govern all cases. The question as to whether the jurisdiction of this Court under Article 136 should be exercised or not, and if yes, on what terms and conditions, is a matter which this Court has to decide on the facts of each case;

Reverting then to the main point raised by the appellants in this appeal we do not think we would be justified in refusing to deal with the merits of the appeal solely on the ground that the appellants did not move the learned Single Judge for leave to prefer an appeal before a Division Bench of the Madras High Court. The infirmity in the judgment under appeal is so glaring that the ends of justice require that we should set aside the decree and send the matter back to the Madras High Court for disposal in accordance with law. The limitations placed by section 100 Civil Procedure Code, on the jurisdiction and powers of the High Courts in dealing with Second Appeals are well known and the procedure which has to be followed by the High Court in dealing with such appeals is also well established. In the present case, the learned Judge has passed an order which reads more like an award made by an arbitrator who, by terms of his reference, is not under an obligation to give reasons for his conclusions embodied in the awards, when such a course is adopted by the High Court in dealing with Second Appeals, it must obviously be corrected and the High Court must be asked to deal with the matter in a normal way in accordance with law. That is why we think we cannot uphold the preliminary objection raised by Mr. Rajagopal Sastri, even though we disapprove of the conduct of the appellants in coming to this Court without attempting to obtain the leave of the learned Single Judge to file a Letters Patent Appeal before a Division Bench of the Madras High Court. Therefore, without expressing any opinion on the merits of the decree passed in Second Appeal, we set it aside on the ground that the judgment delivered by the learned Judge does not satisfy the basic and legitimate requirements of a judgment under the Code of Civil Procedure.

M.S.K. Sastri and M.S. Narasimhan, Advocates, for Appellants.

K. N. Rajagopal Sastri, Senior Advocate, (B.K.B. Naidu, Advocate, with him), for Respondents Nos. 1 to 4.

G.R.

Appeal allowed and remanded.

[SUPREME COURT.]

*P. B. Gajendragadkar, C.J., K.N. Wanchoo,
J.C. Shah, N. Rajagopala Ayyangar
and S.M. Sikri, JJ.
6th March, 1964.*

*Narottam Kishore Deb Varman v.
The Union of India.
W.P. No. 87 of 1962.*

Civil Procedure Code (V of 1908)—Validity of section 87-B—Articles 14, 19, 291, 362 and 372 of the Constitution.

The challenge to the validity of section 87-B, Civil Procedure Code, on the ground that it contravenes Article 14 has been repelled by a recent decision of this Court in *Mohan Lal Jain v. His Highness Maharaja Sri Swami Mun Singhji*, (1962) 1 S.C.R. 702.

Where frivolous claims are set up by intending litigants refusal to give sanction may be justified, but where genuine disputes arise between a citizen and a Ruler of a former Indian State and these disputes, *prima facie*, appear to be triable in a Court of law, it would not be fair or just that the said citizen should be prevented from inviting a Court of competent jurisdiction to deal with his dispute. If the power to grant sanction is exercised in a sensible way and is not used for stifling claims which are not far-fetched or frivolous, that may prevent the growth of discontent in the minds of litigants against the artificial provision prescribed by section 87-B. In the present proceedings, it does appear *prima facie*, that the petitioners have a genuine grievance against the Central Government's refusal to accord sanction to them to get a judicial decision on the dispute between them and respondent No. 2. That, naturally is a matter for the Central Government to consider. However, since it is not possible to accede to the petitioners' argument that section 87-B is invalid, we have no alternative but to dismiss the writ petition. In the circumstances, there would be no order as to costs.

S.S. Shukla, Advocate, for Petitioners.

N.S. Bindra, Senior Advocate, (*R.H. Dhebar*, Advocate, with him), for Respondent.

M.C. Setalvad, Senior Advocate, (*D.N. Mukherjee*, Advocate, with him), for Respondent No. 2.

G.R.

Petition dismissed.

[SUPREME COURT.]

*K. Subba Rao, K.G. Das Gupta and
Raghubar Dayal, JJ.
6th March, 1964.*

*Ugar Ahir v.
State of Bihar.
Crl. A. No. 67 of 1962.*

Criminal Trial—Evidence—Meaning of the maxim Falsus in uno, falsus in omnibus (false in one thing, false in every thing).

Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is therefore, the duty of the Court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. That is what the Courts have done in this case. In effect, the Courts disbelieved practically the whole version given by the witnesses in regard to the pursuit, the assault on the deceased with lathis, the accused going on a bicycle, and the deceased wresting the bhala from one of the appellants and attacking with the same two of the appellants, the case that the accused attacked the witnesses, and the assertion of the witnesses of their being disinterested spectators. If all this was disbelieved, what else remained? To reverse the metaphor, the Courts removed the grain and accepted the chaff and convicted the appellants. We, therefore, set aside the conviction of the appellants and the sentence passed on them.

Nur-ud-din Ahmed and U.P. Singh, Advocates, for Appellants.

D. Goburdhan, Advocate, for Respondent.

G.R.

Appeal allowed.

[SUPREME COURT.]

*K. Subba Rao, K.C. Das Gupta and
Raghubar Dayal, JJ.
6th March, 1964.*

*Sunil Kumar Paul v.
State of West Bengal.
Cr. A. No. 156 of 1961.*

West Bengal Criminal Law Amendment (Special Courts Acts) (XXI of 1949) Penal Code (XLV of 1860), sections 409, 409 and 161 read with 116—Criminal Law Amendment Act (XLVI of 1952)—Criminal Procedure Code (V of 1898), sections 226, 227.

The Special Court could try the appellant of the offence under section 420, Indian Penal Code, and therefore the High Court was right in altering his conviction from that under sections 409 to 420, Indian Penal Code.

In the circumstances, therefore, the appellant cannot be said to be prejudiced in his conviction under section 420, Indian Penal Code on account of the non-framing of the charge, and consequent non-trial, under section 420, Indian Penal Code. In fact, in the circumstances of the case, no question of irregularity in the trial arises. The framing of the charge under section 420, Indian Penal Code was not essential and section 237, Criminal Procedure Code itself justifies his conviction of the offence under section 420 if that be proved on the findings on the record.

The last contention for the appellant was that the sentence is severe. We do not consider a sentence of 1 year's rigorous imprisonment and a fine of Rs. 2,000 severe.

D.N. Mukherjee, Advocate, for Appellant.

P.K. Chakraborty, Advocate for *P.K. Bose*, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C. J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar
and S.M. Sikri, JJ.
9th March 1964.

State of U. P. v. Audh
Narain Singh
C. A. No. 120 of 1963.

Constitution of India (1950) Article 311—Powers of the District Collector in U.P.—Relationship of Master and Servant—Functions and duties of Tahvildars.

The Government Treasurer is a civil servant of the State holding a specific post, and he is authorised by the terms of his employment to employ Tahvildars to assist him in discharging his duties. Payment of remuneration to the Tahvildars is for services rendered in the "cashier department of the District Treasury" of the State. The Tahvildars receive their remuneration directly from the State, and are subject to the control of the District Officers in the matter of transfer, removal and disciplinary action. Employment of Tahvildars being for the purpose of carrying out the work of the State, even though a degree of control is exercised by the Government Treasurer and the appointment is in the first instance made by the Treasurer subject to the approval of the District Officers, it must be held that the Tahvildar is entitled to the protection of Article 311 of the Constitution.

The order removing a Tahvildar in the instant case from service was made at the instance of the Controller, and did not conform to the requirements of Article 311 (2) of the Constitution and was on that account invalid.

H.N. Sanyal, Solicitor-General of India, (C.P. Lal, Advocate, with him), for Appellants.

M.C. Setalvad, Senior Advocate, (J.P. Goyal, Advocate, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C. J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar
and S. M. Sikri, JJ.
9th March, 1964.

Raj Kumar Narsingh Pratap.
Singh Deo v. State of Orissa
C.A No. 133 of 1963.

Foreign Jurisdiction Act (XLVII of 1947), Articles 372, 366 (10) of the Constitution—Meaning of existing Law—Is Sanad a Law.

Now, it is plain that there is no legislative element in any of the provisions of this grant. It does not contain any command which has to be obeyed by the citizens of the State ; it is a gift pure and simple made by the Ruler in recognition of the fact that under the custom of the family and the customary law of the State, he was bound to maintain his junior brother. The grant, therefore, represents purely an executive act on the part of the Ruler intended to discharge his obligations to his junior brother under the personal law of the family and the customary law of the State. It would, we think, be idle to suggest that such a grant amounts to law. It is true that partly it is based on the requirement of personal and customary law ; but no action taken by the Ruler in discharging his obligations under such personal or customary law can be assimilated to an order issued by him in exercise of his legislative authority. Therefore, we have no difficulty in holding that the Sanad in question is a purely executive act and cannot be regarded as law as contended by Mr. Setalvad.

M.C. Setalvad, Senior Advocate, R.K. Garg, M.K. Ramamurthi, D.P. Singh and S.C. Agarwala, Advocates of M/s. Ramamurthi & Co., with him), for Appellant.

S.V. Gupte, Additional Solicitor-General of India, (Ganapathy Iyer and R.H. Dhebar, Advocates, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT].

P.B. Gajendragadkar, C.J., K. N. Wanchoo,
J.C. Shah, N. Rajagopala Ayyangar
and S.M. Sikri, JJ.
9th March, 1964.

A. P. Krishnaswami Naidu v.
The State of Madras
Advocates General of the
State of Madhya Pradesh Maharashtra.
U.P., Rajasthan, Madhya Pradesh and
Punjab, Interveners.
Writ Petition Nos. 1, 7, 8, 10, 53,
and 76 of 1963.

Madras Land Reforms Fixation of Ceiling on Land Act (LVIII of 1961)
section 5, section 50 read with Schedule III, Articles 14, 19 and 31 (2) of the Constitution
—Kerala Agrarian Relations Act, 1961.

The attack on section 5 (1) is that it is hit by Article 14, inasmuch as it denies equality before the law or equal protection of law to persons similarly situate, and reliance is placed in this connection on the decision of this Court in *Karimbil Kunhikoman v. State of Kerala*, (1962) 1 S.C.R. Supp. 829. In that case this Court was considering the Kerala Agrarian Relations Act, 1961 (hereinafter referred to as the Kerala Act). The argument is that as in the Kerala Act, so in the present Act, the word "family" has been given an artificial definition which does not conform with any kind of natural families prevalent in the State, namely, Hindu undivided family, Marumakkattayam family, Aliyasantana family or Nambudiri Illom and that a double standard has been fixed in section 5 (1) in the matter of providing ceiling. It is therefore urged that the ratio of that decision fully applies to the present Act. Therefore, section 5 (1) should be struck down as violative of Article 14 in the same manner as section 58 of the Kerala Act was struck down.

We are clearly of opinion that as in the case of section 58 of the Kerala Act so in the case of section 5 (1) of the Act discrimination is writ large on the consequences that follow from section 5 (1). We therefore, hold that section 5 (1) is violative of the fundamental right enshrined in Article 14 of the Constitution. As the section is the basis of Chapter II of the Act, the whole Chapter must fall along with it.

The provisions of sections 5 and 50 are the pivotal provisions of the Act, and if they fall, then we are of opinion that the whole Act must be struck down as unconstitutional. The working of the entire Act depends on section 5 which provides for ceiling and section 50 which provides for compensation. If these sections are unconstitutional, as we hold they are, the whole Act must fall.

R.V.S. Mani and K.R. Sarma, Advocates, for Petitioner (In W.P. Nos. 1 and 76 of 1963).

R.V.S. Mani and T.R.V. Sastri, Advocates, for Petitioner (In W.P. Nos. 7, 8, 10 and 53 of 1963).

A. Ranganadham Chetty, Senior Advocate, (A.V. Rangam, Advocate, with him), for Respondent (In all the Petitions).

I.N. Shroff, Advocate, for Interveners Nos. 1 and 5 (In all the Petitions).

M.C. Setalvad and N.S. Bindra, Senior Advocates, (R.H. Dhebar, Advocate, with them), for Intervener No. 2 (In W.P. 1 of 1963).

C.P. Lal, Advocate, for Intervener No. 3 (In W.P. No. 1 of 1963).

R.H. Dhebar, Advocate, for Intervener No. 4 (In W.P. No. 1 of 1963).

S.V. Gupte, Additional Solicitor-General of India and N.S. Bindra, Senior Advocate, (R.H. Dhebar, Advocate, with them), for Intervener No. 6 (In W.P. No. 1 of 1963).

[SUPREME COURT.]

*P.B. Gajendragadkar, C.J., K.N. Wanchoo,
J.C. Shah, N. Rajagopala Ayyangar and
S. M. Sikri, JJ.*
10th March, 1964.

*Mithoo Shahani v.
The Union of India.*
C.A. No. 552 of 1963 and
W. No. 108 of 1960.

*Displaced Persons (Compensation and Rehabilitation) Act (LIV of 1954)—
Displaced Persons (Claims) Act, 1950—Powers of the Central Government to revise the orders
of the Regional Settlement Commissioners—Rules under Act (LIV of 1954).*

Considering the judgments I.L.R. 11 Rajasthan 1121 (F.B.) and I.L.R. (1964) Punjab 36 (F.B.) the Court held "We are clearly of the opinion that the judgment of the Punjab High Court is correct. The relevant provisions of the Act and the Rules have all been set out in the decision of the Punjab High Court and we do not consider it necessary to refer to them in any detail. It is sufficient to say that they do not contain any provision which militates against the position which is consistent with principle and logic. It is manifest that a sanad can be lawfully issued only on the basis of a valid order of allotment. If an order of allotment which is the basis upon which a grant is made is set aside it would follow, and the conclusion is inescapable that the grant cannot survive, because in order that that grant should be valid it should have been effected by a competent officer under a valid order. If the validity of that order is effectively put an end to it would be impossible to maintain unless there were any express provision in the Act or in the Rules that the grant still stands. It was not suggested that there was any provision in the Act or in the Rules which deprives the order setting aside an order of allotment of this effect. We do not therefore consider that there is any substance in the second point urged by learned Counsel.

Achhru Ram, Senior Advocate (*N.N. Keswani*, Advocate with him), for Appellants and Petitioners.

N.S. Bindra, Senior Advocate (*B.R.G.K. Achar*, Advocate, with him), for Respondents Nos. 1 and 2 (In both the Appeal and Petition).

M.C. Setalvad, Senior Advocate (*K. Jairam* and *R. Ganapathy Iyer*, Advocates with him), for Respondents Nos. 3 to 7 (In both the Appeal and Petition).

G.R.

Appeal and Petition dismissed.

[SUPREME COURT.]

*P.B. Gajendragadkar, C.J., K.N. Wanchoo,
J.C. Shah, N. Rajagopala Ayyangar and
S.M. Sikri, JJ.*
10th March, 1964.

*Brajlal Manilal & Co. v.
The Union of India.*
C.A. Nos. 115 and 116 of 1963.

Mineral Concession Rules, 1949—Mines and Minerals (Regulation and Development) Act (XLIII of 1948)—Jurisdiction of the High Court under Article 226 for issuing a writ of certiorari.

The learned Judges of the Punjab High Court dismissed the petition filed before them under Article 226, apparently because they proceeded on the view that the exercise of jurisdiction of the Central Government under rules 57 and 59 of the Mineral Concession Rules was really administrative in character so that the necessity for reasonable opportunity that is an essential requisite of quasi-judicial procedure was not attracted to the case. That was the view taken by that Court which decision was reversed by this Court—*Shivaji Nathubhai v. Union of India and others*, (1960) 2 S.C.R. 775. It might be mentioned that the decision of this Court was rendered subsequent to their judgment now under appeal and therefore the learned Judges had not the advantage of the pronouncement of this Court

G.S. Pathak, Senior Advocate (*Rameshwar Nath* and *S.N. Andley*, Advocates of *M/s. Rajinder Narain & Co.*, with him), for Appellant (In both the Appeals).

S.G. Patwardhan, Senior Advocate (*B.R.G.K. Achar*, Advocates, with him),
for Respondent No. 1 (In both the Appeals).

I.N. Shroff, Advocate, for Respondent No. 2 (In C.A.No. 116 of 1963).

G.R.

Appeals allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., K.N. Wanchoo,

J.C. Shah, N. Rajagopala Ayyangar

and *S.M. Sikri, JJ.*

11th March, 1964.

Amar Chand Butail v.

The Union of India.

C.As. Nos. 563 and 564 of 1963.

Evidence Act (I of 1872), sections 123 and 163—Plea of res judicata—Requirements of an affidavit—Claim for privilege of documents.

As we have already indicated, a document signed by the Home Minister of Himachal Pradesh had been filed, but it is urged by Mr. Setalvad that this document cannot be treated as an affidavit at all. No doubt it contains the statement that it is solemnly affirmed but the person who made that statement probably was not familiar with the requirements which had to be satisfied in making an affidavit. The learned Additional Solicitor-General had to concede that on the face of it, the document cannot be treated as an affidavit which is required to be filed for the purpose of a making a claim for privilege. On this preliminary ground alone the claim for privilege can be rejected.

In this connection we ought to add that the claim for privilege made on behalf of respondent No. 2 in the Courts below was absolutely unjustified and should never have been made. It is very unfortunate that in resisting the legitimate claim made by the appellant in the present suit, frivolous pleas of fact were initially raised and then given up and the claim for privilege was unreasonably pressed. Since the document which we have admitted completely proves the appellant's case that respondent No. 2 had recognised his claim against the Jubbal State, it follows that the trial Court was justified in decreeing his claim. The result is that the decree passed by the Judicial Commissioner is set aside and that of the trial Court restored. Respondents 1 and 2 are accordingly directed to pay to the appellant the amount of Rs. 1,44,522-6-9.

M.C. Setalvad, Senior Advocate (*T.A. Ramachandran* and *J.B. Dadachanji, O.C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J.B. Dadachanji & Co.*, with him),
for Appellant (In both the Appeals).

S.V. Gupte, Additional Solicitor-General of India (*R. Ganapathy Iyer* and *B.R.G.K. Achar*, Advocates with him), for Respondents (In both the Appeals).

G.R.

Appeals allowed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., K.N. Wanchoo, The Manipur Administration, Manipur v.

K.C. Das Gupta, J.C. Shah and

N. Rajagopala Ayyangar, JJ.

11th March, 1964.

Thokchom Bira Singh.

Crl. A. No. 6 of 1962.

Criminal Procedure Code (V of 1898), sections 144 and 403, Penal Code (XLV of 1860), sections 188, 323, 333 and 440 read with 149.

The argument however, was that the observations in *Pritam Singh v. The State of Punjab*, A.I.R. 1956 S.C. 415, required re-consideration. This submission was rested on two separate lines of reasoning: (1) That the rule in *Sambasivam v. Public Prosecutor, Federation of Malaya*, 1950 A.C. 458 on which *Pritam Singh's* case was based had been dissented from by the English Court of Criminal Appeal in *R. v. Connelly*, (1963) 3 A.E.R. 510, and that similarly, that principle had been departed from by this Court in *Gurcharan Singh v. State of Punjab*, A.I.R. 1963 S.C. 340 (2). That the principle of Common Law which was applied by the Privy Council

in *Sambasivam's case* could have no application in a jurisdiction like ours where the principle of *autre fois acquit* is covered by a statutory provision framed on the lines of section 403 occurring in a Criminal Procedure Code which is exhaustive.

It is, therefore, clear that section 403, of the Criminal Procedure Code, does not preclude the applicability of this rule of issue estoppel. The rule being one which is in accord with sound principle and supported by high authority and there being a decision of this Court which has accepted it as a proper one to be adopted, we do not see any reason for discarding it. We might also point out that even before the decision of this Court this rule was applied by some of the High Courts and by way of illustration we might refer to the decision of Harries, C.J., in *Manickchand Agarwal v. The State*, A.I.R. 1952 Cal. 730. Before parting, we think it proper to make one observation. The question has sometime been mooted as to whether the same principle of issue estoppel could be raised against an accused, the argument against its application being that the prosecution cannot succeed unless it proves to the satisfaction of the Court trying the accused by evidence led before it that he is guilty of the offence charged. We prefer to express no opinion on this question since it does not arise for examination.

As stated earlier, if *Pritam Singh's case* was rightly decided, it was conceded that the decision of the Judicial Commissioner was right.

O. P. Rana and R.N. Sachthey, Advocates, for Appellant.

S.G. Agarwal, Advocate of M/s. Ramamurthi & Co., for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., K.N. Wanchoo,
J.C. Shah, N. Rajagopala Ayyangar
and S.M. Sikri, JJ.
12th March, 1964.

The State of Rajasthan v.
Shyam Lal.
C.As. Nos. 884-887 of 1962.

Constitution of India (1950), Article 295 (2)—*Rajasthan Ordinance No. 1 of 1949.*

So far as income-tax was concerned it was imposed as from 1st April, 1950, after the Constitution had come into force. Here again we find a law which was competently passed by Parliament and which did not transgress any of the constitutional limitations. Such a law therefore must prevail and in the presence of such a law there can be no question of recognition by the Union of the right to exemption, if any, under the agreement with the Ruler of the former Jodhpur State. Therefore, with respect to both the claims raised in that case there was a law which clearly applied to the mills and it was held that there was no recognition by the new sovereign. In the present case we have only the continuance of the old laws and the valuable evidence afforded by Article 6 of the Covenant and there is nothing to show that the right to claim refund was taken away by any law competently passed. In this view of the matter we are of opinion that the appellant can derive no assistance from the case of *Maharaja Shree Umaid Mills, Limited v. Union of India*, A.I.R. 1963 S.C. 953.

S. K. Kapur, Senior Advocate (B.R.G.K. Achar, Advocate with him), for Appellant (In all the Appeals).

R. P. Modi, Advocate and R. K. Garg, Advocate of M/s. Ramamurthi & Co., for Respondents (In C.A.No. 887 of 1962).

G.R.

Appeals dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., K.N. Wanchoo,
J.C. Shah, N. Rajagopala Ayyangar
and S.M. Sikri, JJ.
12th March, 1964.

Bihari Lal Batra v.
The Chief Settlement Commissioner (Rural), Punjab.
C.A. No. 543 of 1962.

Rehabilitation Rules, 1955—Article 14 of the Constitution.

We must confess our inability to comprehend what precisely was the discrimination which the rule enacted which rendered it unconstitutional as violative of

Article 14. So far as we could understand the submission, the unreasonable discrimination was said to exist because of the operation of the proviso. Under the proviso in regard to quasi-permanent allotments 'already made', i.e., made before 21st May, 1955, in the States of Punjab and Pepsu, the test of what was to be considered an "urban area" was to be determined on the basis of the state of circumstances which obtained on 15th August, 1947. The allotment in favour of the appellant was after the rules came into force and was not one "already made." Therefore if on the date of the allotment the land was in an urban area, the allotment would be governed by the main para. of the definition and so could not have been validly made and that was the reason why it was set aside. The discrimination is said to consist in the rule having drawn a dividing line at the date when it came into force, for determining whether the allotment was valid or not. It is the discrimination that is said to be involved in this prospective operation of the rule that we find it difficult to appreciate. It is possible that before the rules were framed the land now in dispute could have been allotted, but because of this it is not possible to suggest that the rule altering the law in this respect which *ex concessis* is within the rule-making power under the Act, is invalid. Such a contention is patently self-contradictory. Every law must have a beginning or time from which it operates, and no rule which seeks to change the law can be held invalid for the mere reason that it affects an alteration in the law. It is sometimes possible to plead injustice in a rule which is made to operate with retrospective effect, but to say that a rule which operates prospectively is invalid because thereby a difference is made between the past and the future, is one which we are unable to follow.

Bishan Narain, Senior Advocate (*N. N. Keswani*, Advocate with him), for Appellant.

B. K. Khanna and *B.R.G.K. Achar*, Advocates, for Respondents Nos. 1 to 3.

D. N. Mukherjee, Advocate, for Respondent No. 4.

R.V.S. Mani and *T.R.V. Sastri*, Advocates, for Respondent No. 5.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P.B. Gajendragadkar, C.J., *K.N. Wanchoo*,

J.C. Shah, *N. Rajagopala Ayyangar*

and *S.M. Sikri*, JJ.

13th March, 1964.

Smt. D. S. Chellammal Anni v.

Masanan Samban.

C.A. No. 356 of 1963.

Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956)—*Madras Cultivating Tenants Protection Act (XXV of 1955)*—*Powers of the High Court under section 115, Civil Procedure Code.*

It is however urged that even if the Revenue Divisional Officer had misunderstood clause (b) of section 3 (4), the High Court could not interfere with the exercise of the discretion by the Revenue Divisional Officer under section 6 (3) of the Protection Act, inasmuch as this provision gives revisional jurisdiction to the High Court to the extent to which such jurisdiction is conferred on it by section 115 of the Code of Civil Procedure. There are two answers to this contention. The first is that the Revenue Divisional Officer was patently wrong in his view of the law and therefore if the High Court interfered with the wrong exercise of discretion this Court in its jurisdiction under Article 136 will not interfere with the order of the High Court which is clearly in the interest of justice. Secondly by taking the view that he cannot and should not exercise his discretion where a tenant has failed to take action under section 3 (3) of the Protection Act, the Revenue Divisional Officer has in our opinion failed to exercise jurisdiction vested in him under the law, and the High Court would be justified in interfering with its order even under section 115 of the Code of Civil Procedure.

M. G. Setalvad, Senior Advocate (*R. Ganapathy Iyer*, Advocate with him), for Appellant.

T.S. Venkataraman, Advocate, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, C.J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar
and S. M. Sikri, JJ.*
13th March, 1964.

Gulraj Singh v.
Mota Singh.
C.A. No. 467 of 1963.

Punjab Pre-emption Act, 1913 as amended by Act (X of 1960)—Validity of section 15 (2) (b)—Hindu Succession Act (XXX of 1956)—Meaning “Son or daughter”.

We have, therefore, to ascertain whether by the expression ‘son or daughter’ only the legitimate issue of such female is comprehended or whether the words are wide enough to include illegitimate children also. That the normal rule of construction of the words “child”, “son” or “daughter” occurring in a statute would include only legitimate children *i.e.*, born in wedlock, is too elementary to require authority. No doubt, there might be express provision in the statute itself to give these words a more extended meaning as to include also illegitimate children and section 3 (j) of the Hindu Succession Act (Act XXX of 1956) furnishes a good illustration of such a provision. It might even be that without an express provision in the regard the context might indicate that the words were used in a more comprehensive sense as indicating merely a blood relationship apart from the question of legitimacy. Section 15 with which we are concerned contains no express provisions and the context, so far as it goes, is not capable of lending any support to such a construction. In the first place, the words “son or daughter” occur more than once in that section. It was fairly conceded by Mr. Bishan Narain that where the son or daughter of a male vendor is referred to, as in section 15 (1), the words mean only the legitimate issue of the vendor. If so, it cannot be that in the case of a female vendor the words could have a different connotation. Even taking the case of a female vendor herself, there is a reference in section 15 (2) (a) (i) to the brother’s illegitimate son as comprehended within those words. The matter appears to us to be too clear for argument that when section 15 (2) (b) (i) uses the words “son or daughter” it meant only a legitimate son and a legitimate daughter of the female vendor.

Bishan Narain, Senior Advocate (*Naunit Lal*, Advocate, with him), for Appellants.

Yashpal Gandhi and *S. D. Goswami*, Advocates, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*P. B. Gajendragadkar, C.J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar
and S. M. Sikri, JJ.*
16th March, 1964.

Ram Sharan v.
The Dy. Inspector-General of
Police, Ajmer.
W.P. No. 175 of 1963

Constitution of India (1950), Articles 14 and 15—Police Act (V of 1861).

Balancing the various considerations mentioned above therefore it seems to us that the system in force in the State of Rajasthan evolved as it has been for the efficiency of the police in the State as well as for administrative convenience cannot be said of itself to deny equality before the law or to deny equality in the matter of employment in public service, even though at times it may happen, because of the system that a junior Head-Constable in one range may get promotion as Officiating Sub-Inspector while in another range a senior Head-Constable may have to wait for some time. We are therefore not prepared to strike down this system as denying equality before the law or denying equality in the matter of employment in the public service, simply on the ground of these possible cases of hardships.

It is true that if there is wholesale abuse of the power of transfer by the Inspector-General of Police (for it is he alone who can transfer Sub-Inspectors from one range to another), a case of glaring denial of equality before the law or glaring denial of equal opportunity for employment in the service of the State may arise. But we

cannot strike down a system on the supposition that an Inspector-General of Police may abuse his power and create glaring instances of denial of equality before the law or of equal opportunity of employment in the service of the State. A system like this cannot be struck down on the ground that it may be abused. In case of abuse in this wholesale manner a case may arise for striking down from the abuse and not the system.

Before we part with this petition we should like to sound a note of warning that the system of promotion of Head-Constables to Sub-Inspectors within a range can be rationally supported on the basis that inter-range transfers of Sub-Inspectors would be a matter of rare occurrence and would not be effected liberally or for ulterior motives—this is an important aspect of the matter which should always be borne in mind by the authorities concerned in Rajasthan in order to avoid any further challenge to the system.

B.D. Sharma, Advocate, for Petitioner.

S.V. Gupta, Additional Solicitor-General of India and *G.C. Kasliwal*, Advocate-General for the State of Rajasthan (*B.R.G.K. Achar*, Advocate with them), for Respondents.

G.R.

Petition dismissed.

[SUPREME COURT.]

A.K. Sarkar, *M. Hidayatullah* and
J.R. Mudholkar, JJ.
16th March, 1964.

Bondada Gajapathi Rao v.
The State of A.P.
Crl. A. No. 179 of 1961.

Criminal Procedure Code (V of 1898), section 431—Death of accused—Abatement of his appeal against conviction.

Per *Sarkar, J.* : “The legal representatives are not entitled to continue the appeal. That being so and as the sentence was one of imprisonment which would not affect anyone after the death of the accused, it cannot be said that there is anyone interested in the appeal. There is no question, therefore, in such a case for proceeding further with the appeal.”

Per *Hidayatullah, J.* : “There is good reason for holding that a criminal prosecution in which the State is anxious to bring an offender to book with a view to getting him punished for a crime comes to an end on the death of the person arraigned. The same principle must apply also to appeals after conviction, except in so far as a judgment already rendered touches assets which would come to the legal representative or the executor as the case may be. Beyond this it is not possible to conceive of remoter interests because if the law were to take into account such remote interests every appeal would have to be continued after the death of the appellant. In my judgment, the present petitioners do not claim any direct interest and the appeal must, therefore, be taken to have abated.”

Per *Mudholkar, J.* : “Indeed, the Legislature has, by limiting in section 431 of the Code the survival of appeals to appeals against sentences of fine has chosen to recognise only one kind of interest and no other. There could be several other kinds of interest, as was suggested during the argument at the Bar. But this Court, in exercise of its inherent powers or discretionary powers, would not be acting according to correct legal principles in recognising a kind of interest which the Legislature has not chosen to recognise. In the circumstances, therefore, I am clear that the applicants ought not to be granted leave to prosecute the appeal.”

G.R.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT:—A.K. SARKAR, J.C. SHAH AND RAGHUBAR DAYAL, JJ.

R. Ratilal & Co.

.. Appellants*

v.

The National Security Assurance Co., Ltd. (In Liquidation) .. Respondent.

Insurance—Fire insurance—Letter of cover—If policy of insurance—Unstamped letter of cover or interim protection note issued in respect of re-insurance—Destruction of property by fire—Suit to recover loss—Admissibility of letter of cover on payment of stamp duty and penalty—Permissibility.

Stamp Act (II of 1899), section 35, Proviso (a) and Article 47-B of Schedule 1—General Exemption under Article 47 and Proviso—“Bears the stamp prescribed by the Act for such policy”—Interpretation.

Sarkar and Shah, JJ.—The fact that a letter of cover or “Interim Protection Note” in respect of fire insurance contains a contract of insurance cannot make it a policy of insurance.

In order to obtain an insurance against the risk of fire, the assured has first to send a proposal to the insurer and the insurer then takes some time in making inquiries as to whether he would accept the proposal and undertake the obligation of covering the risk. He issues a policy only after he is satisfied that it would be a prudent proposition to do so. Since, however, some kind of protection is necessary for the interim period when the insurer is making the inquiries, such protection is given by a letter of cover. It is expressly a contract granting insurance for the period between the date of that letter and until a policy is prepared and delivered, if one is eventually issued, or otherwise up to a date mentioned in it. An engagement to issue a policy means more or less the same thing as a letter of cover. A letter of cover, therefore, cannot be admitted in evidence under section 35 of the Stamp Act as a policy of insurance.

It does not, however, follow that a letter of cover is not an instrument chargeable with duty because of the *General Exemption* in Article 47 of the Stamp Act. Nor can it be said that if it is made to “bear a stamp”, it is not one chargeable to stamp duty. Such a construction of the words “bears the stamp prescribed by this Act” in the Proviso to the *General Exemption* to Article 47 is unwarranted and absolutely erroneous. On the other hand, by the use of the words “bears the stamp” the Legislature clearly intended to convey that a letter of cover would be chargeable to duty in all cases except for compelling delivery of a policy.

A letter of cover is, therefore, an instrument chargeable to duty under the Stamp Act and admissible in evidence on payment of the requisite duty and penalty under the Proviso (a) to section 35 of the Stamp Act, as it is neither an instrument chargeable to duty not exceeding ten naye paise nor a bill of exchange or a promissory note.

Per Raghubar Dayal J.—Though an Interim Protection Note does not amount to a policy of insurance, and is only a letter of cover or engagement to issue a policy of insurance, it cannot be subsequently stamped in view of the Proviso (a) to section 35 of the Stamp Act. A letter of cover is not chargeable with duty in view of the *General Exemption* to Article 47; it is a document which, as such is not chargeable with duty. No suit can be instituted for the recovery of any amount alleged to be due to the person to whom it is issued, and so no question of taking action under Proviso (a) to section 35 can arise.

“Chargeable” under the Act in section 2 (6) of the Act indicates that the chargeability would be the ultimate result of the various provisions of the Act.

Appeal from the Judgment and Decree dated 24th May, 1960 of the Calcutta High Court in Appeal from Original Decree No. 144 of 1958.

Dr. B. K. Bhattacharjee, Senior Advocate (*D. K. De* and *S. N. Mukherjee*, Advocates with him), for Appellant.

N. C. Chatterjee, Senior Advocate (*D. N. Mukherjee*, Advocate, with him), for Respondent.

The Court delivered the following Judgments:

Sarkar, J. (for himself and *Shah, J.*)—The appellant filed a suit in the Original Side of the High Court at Calcutta on a duly completed policy of fire insurance dated 15th March, 1951 and bearing No. 26625, and an unstamped letter of cover dated 5th November, 1951, in respect of the same kind of insurance, issued by the respondent, to recover from it the loss suffered as a result of the destruction of the insured goods by fire. The respondent admitted liability on policy No. 26625

but with regard to the letter of cover it contended that the letter was not admissible in evidence for want of stamp. As it did not contest liability on that letter on any other ground nor on the policy, the only question in this appeal is whether the letter of cover can be admitted in evidence. That question depends on some of the provisions of the Stamp Act, 1899, to which reference will be made in due course.

The letter of cover which bore the description 'Interim Protection Note' provided that the appellant

"Proposing to effect insurance against fire.....and having agreed to pay..... Tariff Premium thereon, the property is hereby held insured to the extent of Rs. 1,00,000 in the manner specified below."

Then followed a description of the goods and the statement that the risks to be covered were to be as per the said policy No. 26625 for twelve months from 5th November, 1951. Thereafter it was stated,

"The protection is in force for thirty days.....or until the Company's Policy is prepared unless the Insurance is declined".

The fire, on which the claim is based, occurred on the night of 5th November, 1951 or during the early hours of the morning of the next day. It is not in dispute that the appellant offered to pay all premium due on the letter of cover.

It will be useful at this stage to refer to two of the provisions of the Stamp Act and they are section 35 and Article 47 in Schedule I. Section 35 provides,

"No instrument chargeable with duty shall be admitted in evidence for any purpose..... unless such instrument is duly stamped :

Provided that—(a) any such instrument not being an instrument chargeable with a duty not exceeding ten naye paise only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable,.....together with a penalty of....."

There is no dispute that the letter of cover is an "instrument". Schedule I of the Act specifies the duties payable on various instruments. Article 47 of the Schedule specifies the duties chargeable on various kinds of policies of insurance. Section B of this Article deals with fire insurance policies and specifies various duties as payable in respect of various kinds of policies of fire insurance for diverse amounts, the minimum duty chargeable on policy of insurance under this Article being fifty naye paise. Now this Article contains at the end a General Exemption which is in these words :

General Exemption.—"Letter of cover or engagement to issue a policy of insurance :

Provided that, unless such letter or engagement bears the stamp prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned."

It seems to us clear that the words "such policy" in the proviso to the *General Exemption* in Article 47 refer to the kind of policy with which a letter of cover or engagement to issue a policy mentioned in the first part of the exemption, is concerned. In the present case, therefore, the words "such policy" would indicate a policy of fire insurance. This does not appear to be disputed.

It was said on behalf of the appellant that the letter of cover was really a policy of insurance and would be admissible in evidence on payment of the duty chargeable on a policy of fire insurance and penalty under the provisions of section 35, Proviso (a) of the Act. It was next said that even if it was not a policy of insurance but a letter of cover only, it would still be admissible in evidence under that section as an instrument chargeable with duty as it was neither a bill of exchange nor a promissory note nor an instrument chargeable with duty not exceeding ten naye paise.

The learned trial Judge held that the instrument was not a letter of cover but it was in reality a policy of insurance because it contained a contract of insurance. It is not in dispute that if this view is correct, then on payment of the duty and the penalty the instrument would be admissible in evidence under section 35. The Appellate Bench of the High Court, however, was unable to accept the view of the learned trial Judge and, we think, in this the Appellate Bench was right. The fact that a letter of cover contains a contract of insurance cannot make it a policy of insurance. As the learned Judges of the Appellate Bench rightly pointed out,

the letter of cover was granted a general exemption from the liability to the duty specified in Article 47, that is to say, it was exempted from duty which would, but for such exemption, have been payable on it under that Article. Now under Article 47 duty was payable on various policies of insurance. It would follow that a letter of cover would have been liable to duty as a policy of insurance if the exemption had not been granted. The letter of cover had, therefore, to contain a contract of insurance for it would not otherwise have been liable to duty under Article 47. But it did not thereby become a policy of insurance only for then the exemption and the Article would have been in conflict with each other. We may also mention that the word 'cover' itself indicates that property is held insured or covered by it against certain risks.

What then is a letter of cover? How is it to be distinguished from a policy of insurance? The Act contains no definition of it or of an 'engagement to issue policy of insurance', but the terms are well known in trade. The Act is dealing with businessmen and with mercantile documents well known to them. It may be shortly stated that a letter of cover no doubt contains a contract of insurance but it is not a policy of insurance in the common understanding of that word in the trade. It is well known that in order to obtain an insurance against the risk of fire the assured has first to send a proposal to the insurer and then the insurer takes a little time in making enquiries as to whether it would accept the proposal and undertake the obligation of covering the risk. He issues a policy only after he is satisfied that it would be a prudent business proposition to do so. Experience of trades-people has however shown that some kind of protection for the interim period when the insurer is making the enquiries is necessary. This protection is given by what is called a 'letter of cover'. It is expressly a contract granting insurance for the period between its date and until a policy is prepared and delivered if one is eventually issued or otherwise upto a date mentioned in it, just as a period of thirty days is mentioned in the Interim Protection Note issued in this case: see *The Citizen Insurance Co. of Canada v. William Parsons*¹. We think that the present Interim Protection Note satisfies the conditions which would make it a letter of cover in this sense. It gives protection for a period of thirty days or the period upto the date of the issue of the policy. An engagement to issue a policy means, it seems to us, more or less the same thing as a letter of cover. A letter of cover, therefore, cannot be admitted in evidence under section 35 as a policy of insurance.

The next question is whether a letter of cover is itself an instrument chargeable with duty under the Act. It is not disputed that if it is not so chargeable, it cannot be admitted in evidence under section 35 by subsequent payment of duty and penalty. Now section 3 specifies instruments which are chargeable with duty under the Act. It says

"subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor respectively, that is to say,—(a) every instrument mentioned in that Schedule which... is executed in India on or after the first day of July, 1899."

1st July, 1899, is the date on which the Act came into force.

Now the contention of the respondent is that a letter of cover is not an instrument chargeable with duty because the *General Exemption* in Article 47 of the Schedule exempts it from such duty. This contention was accepted by the learned Judges of the Appellate Bench of the High Court who pointed out,

"It is significant that the words used are not that such letter is chargeable with duty. The words used are 'bears the stamp prescribed by the Act for such policy.' On a proper interpretation this means that such letter of cover is not chargeable with duty as such under the Act but if it bears the stamp prescribed by the Act for a policy of insurance, then it will shed its inability and will become a competent document on which a claim for loss could be made."

They further observed

"as no stamp is fixed for such a letter of cover being not a document chargeable with duty the Statute uses the significant words or 'bearing the stamp' and indicates the rate by saying that

1. (1881) L.R. 7 A.C. 96.

the stamp must be the same for such a letter of cover which is prescribed for a policy of insurance under the Act."

In this Court Mr. Chatterjee for the respondent also advanced the same argument.

We are unable to accept the view which found favour with the Appellate Bench of the High Court. The matter was put in two ways. The first was that an instrument which is exempted from duty by Schedule I is not chargeable with duty under section 3 and a letter of cover is so expressly exempted. No doubt if an instrument is exempted by the Schedule from duty, then it cannot be chargeable. But we do not think that a letter of cover is for all purposes exempted from duty by the *General Exemption*. We think the proper construction of the *General Exemption* clause is that the exemption is to apply only if the letter of cover is used for compelling the delivery of the policy mentioned in it. If it is used for any other purpose, then it is not exempted. That is why a proviso has been employed in the provision and the effect of that is to take the letter of cover out of the exemption in all other cases. If it is taken out of the exemption, then, of course, the present argument fails. We are unable to see how a letter of cover can be said to have been exempted for all purposes, if certain things cannot be claimed under it for the sole reason that it does not bear a stamp. If it were exempted for all purposes, it would be fully enforceable even without a stamp. When a letter of cover is not stamped, then nothing is claimable under it except the delivery of a policy. If, however, it bears the stamp prescribed for the appropriate policy, a claim can be made under it. It seems to us that if an instrument bears a stamp, it has incurred the liability for the stamp duty; it has not then been exempted. Therefore, it cannot be said that a letter of cover is exempted from duty in all cases. When it is not exempted, it is an instrument chargeable to duty.

The other way in which the contention was put is based on the use of the words 'bears the stamp prescribed by this Act'. It was said that if an instrument is made to bear a stamp, it is not thereby made chargeable to stamp duty. We are wholly unable to see how an instrument can bear a stamp prescribed by the Act unless it is chargeable to duty under the Act for the Act deals only with instruments chargeable to duty under it. It is difficult to appreciate the argument that what the proviso meant by the use of the words 'bears the stamp prescribed by this Act for such policy' was only to indicate the amount of the duty. No doubt the rate is there, but the instrument has to bear a stamp of that rate. The Act nowhere says anything as to how an instrument is to bear a stamp. Section 17 says that all instruments chargeable with duty shall be stamped before or at the time of execution. If the letter of cover was not chargeable to duty but has only to bear a stamp as the respondent contends, section 17 would not apply to it. There would then be no provision to prevent an instrument which is not chargeable to duty but is required to bear a certain stamp, from having that stamp affixed to it at any point of time. The result would then be that where an instrument has only to bear a stamp, the stamp can be affixed even at the hearing before the instrument is tendered. That, of course, would not assist the respondent at all and would, in our view, introduce an anomaly in the Act which would be the result of putting an unnatural construction on the words 'bears the stamp.' We think that by the use of the words 'bears the stamp' the Legislature intended to convey that a letter of cover would be chargeable to duty in all cases except for compelling delivery of a policy.

A letter of cover is, in our opinion, therefore, an instrument chargeable to duty under the Act and so admissible in evidence on payment of the requisite duty and penalty under section 35 of the Stamp Act as it is neither an instrument chargeable to duty not exceeding ten naye paise nor a bill of exchange or a promissory note.

It seems to us, though we do not base our judgment on it, that the idea of exempting a letter of cover from payment of duty in the first instance was to avoid the hardship of payment of duty twice over on the same insurance, for the policy issued after the letter of cover had to insure the goods from the time that the letter of cover itself insured them and the policy had to be stamped. If the policy

insured the goods from a date after the expiry of the insurance by the letter of cover, the latter would then be an independent policy of insurance, may be for a shorter time, it would not then be an interim cover and, therefore, not a letter of cover at all. It may also be stated that in very few cases it would be necessary to enforce the letter of cover as an insurance for it is unlikely that in many cases the fire would have occurred during the period covered by it.

We have now to state that the appellant had paid the duty and penalty as required by section 35. There is no objection any more to the admissibility of the letter of cover in evidence. The only defence that was taken by the respondent to the claim of the appellant, therefore, fails and the appeal should succeed.

We wish, however, to observe that we have in this judgment dealt only with a letter of cover concerning fire insurance and our remarks on the interpretation of the Proviso in the *General Exemption* in Article 47 of Schedule I to the Act have been made in that context only. Whether those remarks would apply in the case of a letter of cover concerning other varieties of insurance was not a matter for our consideration and on that question we have expressed no opinion.

*We would for these reasons allow the appeal and pass a decree in favour of the plaintiff-appellant for Rs. 93,628-8-0 and costs with interest thereon from the date of the judgment of the learned trial Judge at six per cent.

Raghubar Dayal, J.—I agree that the interim protection note does not amount to a policy of insurance and that it is a letter of cover or engagement to issue a policy of insurance. I do not agree that it can be subsequently stamped in view of the Proviso (a) to section 35 of the Indian Stamp Act, hereinafter called the Act.

The interim protection note, being a letter of cover, is exempted from stamp duty under the general exception to Article 47 of Schedule I of the Act. It can be used to base a claim, or for any other purpose, only if it bears the stamp prescribed by the Act for the policy which is to be issued in pursuance of the letter of cover. The trial Court admitted this letter of cover on the appellant's paying the requisite duty and the penalty under section 35 of the Act. The High Court has held that this could not be done as the provisions of section 35 of the Act were not applicable to documents which were not chargeable with duty under the Act. The correctness of this view is challenged for the appellant.

The general exception, together with the proviso reads :

"Letter of cover or engagement to issue a policy of insurance :

Provided that, unless such letter or engagement bears the stamp prescribed by this Act for such policy, nothing shall be claimable thereunder, nor shall it be available for any purpose, except to compel the delivery of the policy therein mentioned."

Section 35 of the Act, omitting the provisions other than (a), reads :

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by public officer, unless such instrument is duly stamped :

Provided that—

(a) any such instrument, not being an instrument chargeable with a duty not exceeding ten naye paise only or a bill of exchange or promissory note shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion ;"

It is clear that an unstamped letter of cover or engagement to issue a policy of insurance can be used only for compelling the delivery of the policy therein mentioned, and can neither be used for any other purpose nor can any claim be based on it. A claim can be based on it if it bears the stamp prescribed by the Act for the policy contemplated by the letter of cover or engagement. The question then is whether the proviso contemplates the letter of cover to bear the stamp prescribed for the policy at the time it is executed or can take in a letter of cover which is not so stamped at

the time of its execution but is subsequently stamped by any person interested in stamping it or under any orders under the Act. I am of opinion that it contemplates letter of cover to bear the necessary stamp at the time of execution and that any subsequent affixing of requisite stamps on an unstamped letter of cover will not make it a document which can be used for any purpose including the basing of a claim.

The various provisions of the Act provide for the subsequent stamping of the document only when that document is chargeable with duty, under the provisions of section 3 of the Act. The Act does not, and naturally, could not have dealt with orders for subsequent stamping of documents which at the time of execution are not liable to stamp duty. They are good valid documents without any stamp duty and therefore no question can arise in future about their being stamped under the orders of Court or a public officer. There is no such provision either in the Act, though a number of sections deal with the subsequent charging of the deficit duty and penalty as well. No penalty can be contemplated on account of a document being not stamped when it required no stamp under the provisions of the Act and was therefore not chargeable with stamp duty.

It is pertinently remarked in *Narayanan Chetti v. Karuppathan*¹ :

"It appears to me that the levy of a penalty authorized under the proviso, on the admission of an insufficiently stamped document, implies a punishment for neglect in failing to affix the proper stamp at the time of execution. The levy of a penalty shows that the date of execution is that which is regarded in the use of the word 'chargeable' and that chargeable, therefore, means not chargeable under the Act of 1879, but chargeable under the Act in force at the date of execution."

The view expressed in this case was affirmed by the Full Bench in *A reference from the Board of Revenue to the Madras High Court under section 46 of the Act*.²

The provisions of section 35 apply to such instruments which were chargeable with duty. Such instruments, if not properly stamped, were not to be admitted in evidence for any purpose, nor could they be acted upon, registered or authenticated by any person or by any public officer. Certain instruments which are not duly stamped can be admitted in evidence if they fall under any of the provisions of the section. The provisions of this section will not apply to instruments which are not chargeable with duty.

"Chargeable", according to section 2 (6), means 'chargeable' as applied to an instrument executed or first executed after the commencement of the Act chargeable under the Act and as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, first executed. The expression 'chargeable under the Act' indicates that the chargeability would be the ultimate result of the various provisions of the Act.

Section 3 of the Act provides that subject to the provisions of the Act and the exemptions contained in Schedule 1, the instruments mentioned within its clauses (a), (b) and (c) would be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor. This means that instruments which are exempted under any provision of the Act cannot be said to be chargeable with duty even though in the absence of the exemptions those instruments would have fallen under any of the Articles of Schedule I. A policy of insurance is chargeable with duty under Article 47 of Schedule I, but a letter of cover is not chargeable with duty in view of the *General Exemption* to this Article. It follows that the letter of cover is a document which, as such, is not chargeable with duty.

A document chargeable with duty and executed by any person in India is to be stamped before or at the time of execution : *vide* section 17. If the letter of cover is intended by either the insured or the person offering to make an insurance to be used for making a claim thereunder and therefore to be treated as a policy, it is incumbent on that person to have the letter of cover properly stamped with the requisite stamp for that policy. If they do not so intend and desire, the letter of cover to remain as a letter of cover on the basis of which only the delivery of the policy mentioned

1. 1881) I.L.R. 3 Mad. 251, 253.

2. (1882) I.L.R. 5 Mad. 394 (F.B.)

therein can be enforced, they may take advantage of the general exception and need not stamp it. The decision to stamp it or not to stamp it is to be taken at the time when it is to be executed. If it is not then stamped, it is a mere letter of cover which requires no stamp duty. It is a valid and complete document. No provision of the Act for its being stamped subsequently either by any of the parties to it or by any public servant exists. The provision in the proviso to the general exception about the letter of cover being used to found a claim or for any other purpose when it bears stamp prescribed by the Act for such policy, cannot be construed to mean that subsequent to its execution any party standing to gain thereby may just put the requisite stamp on it and thereafter use it for enforcing any claim or for any purpose. Such a construction of the proviso would be against public policy and may defeat one of the objects of the Act. It is true that the Act is a revenue measure, but at the same time the stamping of documents gives a certain formality to the transaction and to the preparation of the document. The letter of cover is exempted from stamp duty because as unstamped it cannot be used for any purpose except for enforcing delivery of the policy. If subsequent stamping of such document, in order to convert the letter of cover into a real policy, be left at the sweet will of the party standing to gain on account of the uncertain event having occurred, it would be against public policy because thereby a party who is sure to gain by fixing the requisite stamp, whose value is bound to be negligible compared to the monetary gain it stands to gain, will not mind the fixing of the necessary stamp and parties in general would like to avoid payment of the stamp duty in the first instance when the document is executed. Further, the letter of cover is issued by the insurer and, on the happening of the uncertain event, it would be the person insuring who would like to affix the requisite stamp and thereafter claim the amount of damages incurred within the limits of the policy. The executant of the letter of cover may thus be forced to abide by the terms of the document as a policy when he, at the time of executing the document, did not intend to be so bound. When a letter of cover is not stamped at the time of execution, both the parties stand to lose what they are to gain monetarily on its basis. The person insuring stands to lose the recovery of any loss he may incur prior to the issue of the policy. The insurer-company stands to lose the recovery of the premium for the limited period, *i.e.*, the period between the date of the cover note and the date when loss occurs to the proposer. Both the parties take risk of loss by not stamping the letter of cover and thus not making it a document on which the claim other than the delivery of the policy can be based.

In this connection, reference may be made to section 47 of the Act which provides for a subsequent stamping of certain documents in certain circumstances. But this too deals with certain documents which, though chargeable with duty are not covered by Proviso (a) to section 35.

Section 62 (1) (b) makes it penal to execute or sign otherwise than as a witness, any instrument chargeable with duty and not included in clause (a), without its being duly stamped. Any subsequent stamping of a letter of cover with the requisite stamp would lead to the parties avoiding the penalty prescribed by section 62 (1) (b), as the letter of cover is not chargeable with duty and the subsequent stamping would mean that it becomes a policy of insurance, a document which could be enforced on account of being properly stamped.

Section 29 provides that in the absence of an agreement to the contrary the expenses of providing the appropriate stamp shall be borne in the case of a policy of fire insurance by the person issuing the policy. Though there is no definite provision in the Act as to who should stamp the document, in view of the provisions of section 62, the person to suffer for non-stamping a document chargeable with duty is the executant. The insurer will not like to stamp the letter of cover subsequently and specially when the uncertain event had taken place. Subsequent stamping by the assured in such circumstances, could not have been contemplated by the Legislature.

Further in view of the proviso to the general exception to Article 47, nothing could be claimed under an unstamped letter of cover. This means that no suit can be instituted for the recovery of any amount alleged to be due to the plaintiff.

When the suit itself cannot be instituted, no question of taking action under section 35 (a) of the Act can arise, as that action is to be taken subsequent to the institution of the suit and at the time of admitting the document in evidence.

It is suggested for the appellant that the provisions of the general exception indicate that the letter of cover was exempted from stamp duty as the Legislature did not intend that the stamp duty be paid twice over, once on the letter of cover and a second time when the policy was issued. If the Legislature had really intended so it could have simply provided that if a letter of cover bears the requisite stamp, the policy need not be stamped. The Legislature, however, spoke differently. It exempted the letter of cover and provided that a letter of cover without stamp could be used only for enforcing the delivery of the policy mentioned therein. The object behind the exemption therefore appears to be the very limited purpose for which the letter of cover can be used. The Legislature was aware of a letter of cover usually containing material which would make it a policy for a limited period and therefore further provided that it can be used to found a claim or for any other purpose if it bears the requisite stamp for a policy. The reasonable inference is that the Legislature left it to the discretion of the parties concerned to have the letter of cover stamped or not according to the use they intended to make of it, and therefore it would be wrong to construe the provision to the effect that any subsequent stamping of the document in any circumstance would change the nature of the document and make it available for purposes for which it was not intended to be used at the time of execution.

Reliance has been placed for the appellant on the case reported as *Tricamji Dhamji & Co. v. Vijir Kanji*¹. In that case the plaintiff had claimed damages on the basis of an unstamped protection note with respect to a contract of sea-insurance. Marten J., held that the expression "unless such letter or engagement bears the stamp prescribed by this Act for such policy" in the general exception to Article 47 meant affixation of the stamp before or at the time of execution, as provided by section 17 and that section 35 (a) must be read subject to the express direction in the proviso to the general exception in Article 47. His view was not accepted, wrongly I think, by the Appellate Bench, which held the protection note to be a policy which could be received in evidence after necessary action under section 35 of the Act is taken. We have already held that the protection note in the present suit to be not a policy.

I am therefore of the opinion that the High Court was right in holding that the interim protection note, not properly stamped as a policy at the time of its execution, cannot be subsequently stamped with the requisite stamps in pursuance of the provisions of section 35 (a) of the Act and that the appellant cannot base his claim on the interim protection note in suit. I would, accordingly, dismiss the appeal with costs of this Court and the High Court and modify the decree of the High Court to the effect that the suit for Rs. 93,628-8-0 be dismissed with proportionate costs in the trial Court.

Order of the Court :—In accordance with the opinion of the majority, the appeal is allowed, decree in favour of the plaintiff-appellant for Rs. 93,628-8-0 is passed, and costs with interest thereon from the date of the judgment of the learned trial Judge at six per cent.

P. R. N.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI, JJ.

Andhra Pradesh State Road Transport Corporation by its Chief Executive Officer, Hyderabad .. *Appellant**

v.

Income-tax Officer, B-1, B-Ward, Hyderabad and others .. *Respondents.*

Constitution of India (1950), Article 289—State immunity from Union taxation—State Road Transport Corporation—Majority of shares held by State Government—Corporation's income from transport business—Whether income of the State—Whether immune from Union income-tax.

Road transport business originally carried on departmentally by the State Government of Andhra Pradesh was taken over by the Andhra Pradesh State Road Transport Corporation constituted under the State Road Transport Corporation Act, 1950, wherein the State Government held the majority of shares. Under the constituent Act, the Corporation was to turn over its surplus profits to the State Government for expenditure on road development. There was no specific provision in the said Act in regard to provision for payment of income-tax on the profits. The Income-tax Officer proposed to assess the Corporation's profits to income-tax, despite protests. The Corporation filed writ petitions in the High Court challenging the assessment and claiming immunity under Article 289 of the Constitution. The High Court dismissed the writ petitions. On appeal,

Held, that the property as well as the income in respect of which exemption is claimed under Article 289 (1) of the Constitution must be the property and income of a State.

If a trade or business is carried on by the State departmentally and income is derived from it, the said income is income of the State. If a trade or business is carried on by a State through its agents appointed exclusively for that purpose, and the agents carry it on entirely on behalf of the State and not on their own account, the income from such trade or business is the income of the State.

But difficulties arise where the trade or business is carried on by a Corporation established by a State by issuing a notification under the relevant provisions of the State Road Transport Corporation Act. The Corporation, though statutory, has a personality of its own and this personality is distinct from that of the State or other shareholders. It cannot be said that a shareholder owns the property of the Corporation or carries on the business with which the Corporation is concerned.

The doctrine of the separate entity or personality of the Corporation is subject to the exceptions which the statutes may create, and there may be a statutory provision which might clearly indicate that the trade carried on by the Corporation belongs to the shareholders who brought the Corporation into existence and the income received from the trade likewise belongs to them.

But all the relevant provisions of the State Road Transport Corporation Act, 1950, emphatically bring out the separate personality of the Corporation, and the profit and loss that would be made as a result of the trading activity would be the profit and loss of the Corporation. There is no provision in the Act which has attempted to lift the veil from the face of the Corporation and thereby enable the shareholders to claim that despite the form which the organisation has taken, it is the shareholders who run the trade and who can claim the income coming from it as their own.

The provisions of section 30 of the Act for making over to the State Government the balance of income as indicated therein is of no assistance in deciding the question as to whether the income derived by the Corporation is the income of the State. All that sections 20 and 30 purport to do is to provide for the administration of the funds vesting in the Corporation and their disposal.

Appeals from the Order dated 14th July, 1961 of the Andhra Pradesh High Court in Writ Petitions Nos. 516 to 519 of 1960.

D. Narasaraaju, Advocate-General for the State of Andhra Pradesh (P. R. Ramachandra Rao and T. V. R. Tatachari, Advocates, with him), for the Appellant in all the Appeals.

K. N. Rajagopal Sasri, Senior Advocate, (Gopal Singh and R. N. Sachthey, Advocates, with him), for the Respondents in all the Appeals.

Rajeswari Prashad and S. P. Varma, Advocates, for Intervener No. 1 in all the Appeals.

B. Sen, Senior Advocate, (*S. C. Bose* and *P. K. Bose*, Advocates, with him), for Intervener No. 2 in all the Appeals.

M. C. Setalvad, Senior Advocate, (*S. C. Bose* and *P. K. Bose*, Advocates, with him), for Intervener No. 3 in all the Appeals.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—These four appeals arise from four writ petitions filed by the appellant, the Andhra Pradesh State Road Transport Corporation, in the High Court of Andhra Pradesh against the Income-tax Officer, and the Appellate Assistant Commissioner of Income-tax, Hyderabad, Respondents 1 and 2 respectively, in which it claimed a writ of prohibition restraining them from collecting any tax, or taking any proceedings under the Indian Income-tax Act against them. In its writ petitions, the appellant further claimed an order, writ, or other appropriate direction quashing the assessment orders passed by respondent No. 1 on the 29th February, 1960, for the years 1958-59 and 1959-60. For the first year, a tax on Rs. 13,60,963-86 nP. has been imposed for the period 11th January, 1958 to 31st March, 1958, and for the latter year, a tax of Rs. 34,44,430-48 nP. has been levied for the period 1st April, 1958 to 31st March, 1959. After hearing the parties, the High Court has dismissed the appellant's writ petitions with costs. The appellant then applied for and obtained a certificate from the High Court, and it is with the said certificate that these four appeals have been brought to this Court.

It appears that the appellant was established under the Road Transport Corporations Act, 1950 (LXIV of 1950) (hereinafter called the Act) by a notification issued by the Andhra Pradesh Government and it has been functioning with effect from the 11th January, 1958. Before the formation of the appellant Corporation, the road transport was a department of Government of the Hyderabad, and, after integration of Hyderabad with the Andhra Pradesh, it was run by the Government of Andhra Pradesh. During the whole of this period, the road transport was treated as exempt from income-tax. After the appellant Corporation was, however, formed, the Income-tax Department took the view that the income made by the appellant was liable to tax, and so, a notice under section 22 of the Income-tax Act was served on the appellant on the 29th January, 1959. In pursuance of the proceedings which were taken after service of the notice, the impugned orders of assessment were passed. Before the Income-tax Officer, it was urged by the appellant that since the appellant was an independent body carrying on the business of road transport, it did not fall under any of the five categories of assessee under section 3 of the Income-tax Act, it was neither an individual, nor a Hindu undivided family, nor a firm, nor a company, nor an association of persons, and as it was outside the said five categories of assessee, no tax could be levied against it. It was further argued that the net income of the appellant ultimately goes to the State of Andhra Pradesh under section 30 of the Act, and as such it was immune from Union taxation under Article 289 of the Constitution. Yet, another contention was raised in support of the plea that the notice issued by respondent No. 1 was invalid, and that was that the appellant was a local authority exempt from income-tax. All these contentions were rejected by respondent No. 1 with the result that the impugned orders of assessment came to be passed. It is the validity of these orders that the appellant challenged before the Andhra Pradesh High Court.

The High Court has held that the appellant is not a State-owned Corporation and that it is not carrying on business on behalf of the Government. It has also observed that the trade or business which the appellant was carrying on was not incidental to the ordinary functions of Government, and since no declaration had been made to that effect under Article 289 (3), the appellant could not rely on Article 289 (1). The contention that the appellant was a Local Authority which was urged before the High Court was rejected, and the argument that the charging section of the Income-tax Act was repugnant with the material provisions of the Act, such as sections 28, 29 and 30, was also held to be without any substance by the High Court. Thus, since none of the arguments urged by the appellant before the High Court was accepted, the writ petitions filed by it were dismissed.

The main point urged before us by the learned Advocate-General of Andhra Pradesh on behalf of the appellant is that the income in respect of which the impugned order of assessment has been passed by respondent No. 1, is exempt from Union taxation under Article 289 (1) of the Constitution, and that raises the question about the construction and effect of the provisions of the three clauses of Article 289. Let us, therefore, read the said Article :

“ 289. (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operation connected therewith, or any property used or occupied or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government.”

The learned Advocate-General concedes that the transport activity carried on by the appellant is strictly not incidental to the ordinary functions of Government. It is true that in a modern Democratic Welfare State, Government has to undertake several economic activities some of which are trade activities, while others are commercial activities, because the pursuit of the welfare policies inevitably requires that Government should help the process of economic improvement of its citizens. However desirable these socio-economic activities may be and however legitimate may be the attempt of the State Government to undertake them, there is no denying the fact that the ordinary functions of the Government to which clause (3) of Article 289 refers must be distinguished from these socio-economic activities. The Advocate-General, however, urges that though the trade activities of the appellant may thus be distinguishable from the ordinary functions of Government, they are nevertheless included in Article 289 (1), and income derived by the appellant from the said activities falls within the protection of Article 289 (1).

This argument proceeds on the assumption that clause (2) of Article 289 is an exemption or proviso to clause (1) and as such, whatever is included in clause (2) must be deemed to have been included also in clause (1) ; otherwise, the Proviso cannot be logically explained. It is because the trading or commercial activities of the Government of a State to which the said clause refers were originally included in clause (1) that it became necessary to provide by clause (2) that the said trading or commercial activities carried on by the Government of a State would not claim the benefit of exemption prescribed by clause (1). That is how the Advocate-General seeks to include trading or business activities mentioned in clause (2) in clause (1) itself. Logically, no exception can be taken to this approach.

The next stage in the argument urged by the Advocate-General is that clause (2) is wide enough to include the trading activities carried on by the appellant and as a result of width of its scope, the appellant's activities can be treated as the commercial activities carried on by the Government of Andhra Pradesh itself. It will be noticed that clause (2) refers to a trade or business of any kind carried on by or on behalf of the Government of a State. The argument is that the first part of the clause refers to the trade or business carried on by the Government and that means, carried on by the Government either departmentally or by agents appointed by the Government in that behalf. Whether the Department carried on the business or an agent specifically and exclusively appointed for that purpose carries it on, it is the business carried on by the State. The latter part of the clause refers to trade or business carried on on behalf of the Government of a State, and it is suggested that this part of the clause is intended to take in trade or business carried on by a Corporation like the appellant which is either State-owned or State-controlled. The appellant Corporation, says the Advocate-General, is undoubtedly State-controlled, and he would suggest that it is also owned by the State of Andhra Pradesh. Therefore, the commercial activity carried on by the appellant must be deemed to be an activity carried on on behalf of the State of Andhra Pradesh, and it is with this postulate that the argument reverts to clause (1) of Article 289 and urges that the income received

by the appellant in respect of commercial activities carried on by it on behalf of the Government of Andhra Pradesh is exempt from Union taxation.

In support of this argument, the Advocate-General has relied on a recent decision of this Court in *Akadasi Padhan v. State of Orissa and others*¹. In that case, this Court had occasion to consider the scope and effect of the provisions contained in Article 19 (6). It will be recalled that Article 19 (6) authorises the State, *inter alia*, to make any law relating to the carrying on by the State or by a Corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise. One of the points which fell to be considered in the case of *Akadasi Padhan*¹, was the effect of the words "a law relating to the carrying on by the State of any trade or business." Dealing with this question, this Court held that though, normally, the trade specified in the clause would be carried on by the State departmentally or with the assistance of public servants appointed in that behalf, there may be cases of some trades or businesses in which it would be open to the State to employ the services of agents, provided the agents work on behalf of the State and not for themselves. Relying upon this decision, the Advocate-General argues that when clause (2) of Article 289 refers to trade or business carried on by the Government of a State, it includes trade or business carried on by the Government either departmentally or with the assistance of agents appointed in that behalf, and so, he argues that these two categories of carrying on business having been included in the first part, what the second part is intended to cover is trade or business carried on by the Government of a State through the instrumentality of a corporation like the appellant, and so, the trade or business carried on by the appellant is trade or business carried on on behalf of the Government of Andhra Pradesh within the meaning of Article 289 (2) and that makes the income earned out of the said trade or business income of the State under Article 289 (1).

In substance, this argument is really based on the American doctrine of the immunity of State agencies or instrumentalities from Federal taxation. When this doctrine was accepted by American decisions, it was normally confined to such State agencies as were concerned with functions which were essentially governmental in character. But, says the Advocate-General, since Article 289 (2) takes in trade activities carried on by a corporation like the appellant, the question as to whether the trade is a function which is essentially governmental in character is irrelevant. In support of his contention, the Advocate-General has relied upon two American decisions; first of these is the decision in the case of *Mark Graves John J. Merrill and John P. Hennessey v. People of the State of New York upon the Relation of James B. O'keefe*². In that case Stone, J., who spoke for the Supreme Court of America, has observed that when the national Government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the Government itself through its Departments. In other words, this observation shows that the Court was inclined to take the view that for the purpose of claiming exemption from taxation, it did not make a material difference whether the operation was carried on by the State departmentally or with the assistance of a corporation.

In *Challam County v. United States of America*³, it was held by the Supreme Court of America that a State cannot tax the property of a corporation organised by the Federal Government to produce material for war purposes, the property of which is conveyed to it by, or bought with the money of, the United States, and used solely for the purposes of its creation. Holmes, J., who delivered the opinion of the Court emphasised the fact that in the case before the Court not only the agent was created, but all the agent's property was acquired and used for the sole purpose of producing a weapon for the war. "This is not like the case of a corporation", added the learned Judge,

"having its own purposes as well as those of the United States, and interested in profit on its own account. The incorporation and formal erection of a new personality was only for the

1. (1964) 2 S.C.J. 37 : A.I.R. 1963 S.C. 1047. 3. 68 Law Ed. 328, 331.
2. 83 Law Ed. 927.

convenience of the United States, to carry out its ends, and so, it is unnecessary to consider whether the fact that the United States owned all the stock and furnished all the property to the corporation taken by itself, would be enough to bring the case within the policy of the rule that exempts property of the United States."

Both these decisions would not assist us in determining the question as to whether the income received by the appellant is the income of the State of Andhra Pradesh within the meaning of Article 289 (1), because the decision of the problem raised before us by the appellant must be reached not on any academic considerations of the claims for exemption from taxation which the State instrumentalities can put forward, but on the construction of Article 289 itself. Article 289 (1) exempts from Union taxation the property and income of a State, and the Advocate-General can succeed only if he is able to establish that the income derived by the appellant in respect of which the impugned assessment order has been passed is the income of the State of Andhra Pradesh. Therefore, the American doctrine on which strong reliance was placed by the Advocate-General would be of no assistance to his case. If the trading activity carried on by the appellant is sought to be brought into Article 289 (1) solely as a result of the construction of Article 289 (2), the test on which the validity of the Advocate-General's argument must necessarily be judged, is whether or not the requirement of Article 289 (1) is satisfied and that requirement clearly is that the income or the property for which exemption from Union taxation is claimed must be the income or the property of a State.

Besides, there is another reason why the Advocate-General cannot derive any assistance from the American doctrine of the exemption from taxation in regard to State instrumentalities. The said doctrine has been categorically rejected by this Court in *State of West Bengal v. Union of India*¹. Speaking for the majority of the Court Sinha, C.J., observed that

"it was futile to attempt the resuscitation of the now exploded doctrine of the immunity of instrumentalities which originating from the observations of Marshall, C.J., in *M'Culloch v. Maryland*², has been decisively rejected by the Privy Council as inapplicable to the interpretation of the respective powers of the State and the Centre under the Canadian and Australian Constitutions (vide *Bank of Toronto v. Lambe*³, and *Webb v. Outrim*⁴, and has practically been given up even in the United States".

Thus, it is necessary to revert to the construction of Article 289 in deciding whether the appellant is right in claiming immunity from Union taxation.

We have already seen that Article 289 consists of three clauses, the first clause confers exemption from Union taxation on the property and income of a State. In Special Reference No. 1 of 1962 in *Reference under Article 143 (1)*⁵, a Special Bench of this Court by a majority has held that the immunity granted to the States in respect of Union taxation, under Article 289 (1) does not extend to duties of customs including export duties or duties of excise. In that case, the question which directly arose for decision, was to determine the scope and effect of the nature of taxation from which exemption could be claimed by the property and income of a State under Article 289 (1). With that aspect of the matter, however, we are not concerned in the present appeals.

The scheme of Article 289 appears to be that ordinarily the income derived by a State both from governmental and non-governmental or commercial activities shall be immune from income-tax levied by the Union, provided, of course, the income in question can be said to be the income of the State. This general proposition flows from clause (1).

Clause (2) then provides an exception and authorises the Union to impose a tax in respect of the income derived by the Government of a State from trade or business carried on by it, or on its behalf; that is to say, the income from trade or business carried on by the Government of a State or on its behalf, which would not have been taxable under clause (1), can be taxed, provided a law is made by Parliament in that behalf. If clause (1) had stood by itself, it may not have been easy to include

1. A.I.R. 1963 S.C. 1241 at p. 1256.

2. (1812) 4 Wheat 316 at p. 436.

3. (1887) L.R. 12 A.C. 575.

4. L.R. (1907) A.C. 81.

5. A.I.R. 1963 S.C. 176 : (1964) 1 I.T.J. 671 : (1964) 2 S.C.J. 51.

within its purview income derived by a State from commercial activities, but since clause (2), in terms, empowers Parliament to make a law levying a tax on commercial activities carried on by or on behalf of a State, the conclusion is inescapable that these activities were deemed to have been included in clause (1) and that alone can be the justification for the words in which clause (2) has been adopted by the Constitution. It is plain that clause (2) proceeds on the basis that, but for its provision, the trading activity which is covered by it would have claimed exemption from Union taxation under clause (1). That is the result of reading clauses (1) and (2) together.

Clause (3) then empowers the Parliament to declare by law that any trade or business would be taken out of the purview of clause (2) and restored to the area covered by clause (1) by declaring that the said trade or business is incidental to the ordinary functions of Government. In other words, clause (3) is an exception to the exception prescribed by clause (2). Whatever trade or business is declared to be incidental to the ordinary functions of Government, would cease to be governed by clause (2) and would then be exempt from Union taxation.

That, broadly stated, appears to be the result of the scheme adopted by the three clauses of Article 289. Reading the three clauses together, one consideration emerges beyond all doubt, and that is, that the property as well as the income in respect of which exemption is claimed under clause (1) must be the property and income of the State, and so, the same question faces us again : is the income derived by the appellant from its transport activities the income of the State ? If a trade or business is carried on by the State departmentally and income is derived from it, there would be no difficulty in holding that the said income is the income of the State. If a trade or business is carried on by a State through its agents appointed exclusively for that purpose, and the agents carry it on entirely on behalf of the State and not on their own account, there would be no difficulty in holding that the income made from such trade or business is the income of the State. But difficulties arise when we are dealing with trade or business carried on by a corporation established by a State by issuing a notification under the relevant provisions of the Act. The corporation, though statutory, has a personality of its own and this personality is distinct from that of the State or other shareholders. It cannot be said that a shareholder owns the property of the corporation or carries on the business with which the corporation is concerned. The doctrine that a corporation has a separate legal entity of its own is so firmly rooted in our notions derived from Common Law that it is hardly necessary to deal with it elaborately ; and so, *prima facie*, the income derived by the appellant from its trading activity cannot be claimed by the State which is one of the shareholders of the Corporation.

It may be that the statute under which a notification has been issued constituting the appellant Corporation may provide expressly or by necessary implication that the income derived by the Corporation from its trading activity would be the income of the State. The doctrine of the separate entity or personality of the corporation is always subject to the exceptions which statutes may create, and if there is a statutory provision which clearly indicates that despite the concept of the separate personality of the corporation, the trade carried on by it belongs to the shareholders who brought the Corporation into existence and the income received from the said trade likewise belongs to them, that would be another matter. It would then be possible to hold that as a result of the specific statutory provisions the income received from the trade carried on by the Corporation belongs to the shareholders who have constituted the said Corporation, and, so, we must look to the Act to determine whether the income in the present case can be said to be the income of the State of Andhra Pradesh.

In this connection, we may usefully refer to the observations made by Lord Denning in *Taslin v. Nannaford*¹ :

"In the eye of the law", said Lord Denning "the Corporation is its own master and is answerable as fully as any other person or Corporation. It is not the Crown and has none of the immunities

or privileges of the Crown. Its servants are not civil servants, and its property is not Crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of Government."

These observations tend to show that a trading activity carried on by the Corporation is not a trading activity carried on by the State departmentally, nor is it a trading activity carried on by a State through its agents appointed in that behalf.

That takes us to the provisions of the Act which will assist us in determining the question as to whether the income in question can legitimately be held to be the income of the State of Andhra Pradesh. The Act was passed to provide for the incorporation and regulation of Road Transport Corporations. Section 3 authorises the State Government to issue a notification in the Official Gazette establishing a Road Transport Corporation for the whole or any part of the State under such name as may be specified in the notification, after taking into account considerations specified by clauses (a), (b) and (c). Section 4 then provides that every Corporation shall be a body corporate by the name notified under section 3 having perpetual succession and a common seal, and shall sue or be sued by the said name. Section 5 deals with the constitution of Road Transport Corporation; sub-section (3) provides for the representation both of the Central Government and of the State Government in the Corporation in such proportion as may be agreed to by both the Governments and of nomination by each Government of its own representatives therein; it also contemplates that if capital is raised by the issue of shares to other parties, provision has to be made for the representation of such shareholders. Section 17 authorises the appointment of Advisory Councils. Section 18 prescribes the general duty of the Corporation. Section 23 (1) provides for the capital of the Corporation; under this sub-section, the capital contributed by the Central Government and the State Government is in the proportion of 1 : 3. Sub-section (3) authorises the division of the capital of the Corporation into such number of shares as the State Government may determine; and it provides that the number of shares which shall be subscribed by the State Government, the Central Government and other parties shall also be determined by the State Government in consultation with the Central Government. This provision contemplates the possibility of other shareholders joining the State Government and the Central Government. Section 24 permits additional capital of the Corporation to be raised. Section 25 requires that the shares of the Corporation shall be guaranteed by the State Government as to the payment of the principal and the payment of the annual dividend at such minimum rate as may be fixed by the State Government. Section 26 confers powers of borrowing on the Corporation. Section 27 constitutes a fund of the Corporation. Section 28 provides for the payment of interest and dividend. Section 29 (1) requires the Corporation to make such provisions for depreciation and for reserve and other funds as the State Government may, from time to time, direct. Section 29 (2) provides that the management of the said funds, the sums to be carried from time to time to the credit thereof and the application of the money comprised therein shall be determined by the Corporation. There is a Proviso to this sub-section which prohibits the utilisation of these funds for any purpose other than that for which it was created, without the previous approval of the State Government. Section 30 deals with the disposal of net profits; it says that after provision is made as required by sections 28 and 29, the Corporation may utilise such percentage of its net annual profits as may be specified in this behalf by the State Government for the purposes therein specified, and it adds that out of the balance, such amount as may, with the previous approval of the State Government and the Central Government be specified in this behalf by the Corporation, may be utilised for financing the expansion programmes of the Corporation and the remainder, if any, shall be made over to the State Government for the purpose of road development. Section 31 gives power to the Corporation to spend such sums as it thinks fit on objects authorised by the Act. Section 32 deals with the budget, section 33 with accounts and audit; and section 34 provides that the directions issued by the State Government after consultation with the Corporation shall be followed by the Corpo,

ration, and it adds that such directions may include instructions relating to the recruitment, conditions of service and training of its employees, wages to be paid to the employees, reserves to be maintained by it and disposal of its profits or stocks. Under section 38, power is conferred on State Government to supersede the Corporation for reasons specified by section 38 (1). On supersession, all property vested in the Corporation vests during the period of supersession, in the State Government ; that is the effect of section 38 (2) (c). Section 39 deals with the liquidation of a Corporation, and clause (2) of this section provides that in the event of such liquidation the assets of the Corporation, after meeting the liabilities, if any, shall be divided among the Central and the State Governments and such other parties, if any, as may have subscribed to the capital in proportion to the contribution made by each of them to the total capital of the Corporation.

That, in brief, is the position of the relevant provisions of the Act. There is no doubt that the bulk of the capital is contributed by the the State Government and a small proportion by the Central Government, and in that sense, the majority of shares are at present owned by the State Government. There is also no doubt that the Corporation is a State controlled Corporation in the same sense that in all material stages and in all material particulars, the activity of the Corporation is controlled by the State ; but it is clear that all other citizens may be admitted to the group of shareholders, and from that point of view, the Act contemplates contribution of the capital for the Corporation not only by the Central and the State Governments, but also by the citizens.

The main point which we are examining at this stage is : is the income derived by the appellant from its trading activity, income of the State under Article 289 (1)? In our opinion, the answer to this question must be in the negative. Far from making any provision which would make the income of the Corporation the income of the State, all the relevant provisions emphatically bring out the separate personality of the Corporation and proceed on the basis that the trading activity is run by the Corporation and the profit and loss that would be made as a result of the trading activity would be the profit and loss of the Corporation. There is no provision in the Act which has attempted to lift the veil from the face of the Corporation and thereby enable the shareholders to claim that despite the form which the organisation has taken, it is the shareholders who run the trade and who can claim the income coming from it as their own.

Section 28 which provides for the payment of interest clearly brings out the duality between the Corporation on the one hand and the State and Central Governments on the other. Take, for instance the case of supersession of the Corporation authorised by section 38. Section 38 (2) (c) emphatically brings out the fact that the property really vests in the Corporation, because it provides that during the period of supersession, it shall vest in the State Government. Similarly, section 39 (2) which deals with the distribution of assets in case of liquidation, brings out the same features.

It has been urged before us by the Advocate-General that section 30 contemplates that after provision is made as required by sections 28 and 29 and funds are utilised as prescribed by section 30, the balance has to be given to the State Government for purpose of road development, and that, it is suggested, indicates that the income belongs to the State Government. This argument is clearly not well founded. When we are deciding the question as to whether the income derived by the Corporation is the income of the State, the provision made by section 30 for making over to the State Government the balance that may remain as indicated therein, is of no assistance. The income is undoubtedly the income of the Corporation. All that section 30 requires is that a part of that income may be entrusted to the State Government for a specific purpose of road development. It is not suggested or shown that when such income is made over to the State, it becomes a part of the general revenue of the State. It is income which is impressed with an obligation and which can be utilised by the State Government only for the specific purpose for which it is entrusted to it. Therefore, we are satisfied that the income derived by the appellant from its trading activity

cannot be said to be the income of the State under Article 289 (1), and if that is so, the fact that the trading activity carried on by the appellant may be covered by Article 289 (2), does not really assist the appellant's case. Even if a trading activity falls under clause (2) of Article 289, it can sustain a claim for exemption from Union taxation only if it is shown that the income derived from the said trading activity is the income of the State. That is how, ultimately the crux of the problem is to determine whether the income in question is the income of the State, and on this vital test, the appellant fails.

There is one more point which was faintly argued before us by the learned Advocate-General. He frankly told us that he did not propose to challenge the correctness of the conclusion recorded by the High Court that the appellant is not a Local Authority; but he was not prepared to give up his contention that there is repugnancy between the charging-section of the Income-tax Act and sections 29 and 30 of the Act. He suggested that in view of the repugnancy on which he relied, the Act which is Act LXIV of 1950 should prevail over the Income-tax Act which is an enactment of 1922. None of the assumptions made by the learned Advocate-General in support of this plea can be said to be valid. Though the original Income-tax Act was passed in 1922, as is well known, every year a fresh Finance Act is passed and it is by virtue of such successive Finance Acts that income-tax is assessed from year to year, and so, the argument that the Act on which the appellant relies is later in point of time must fail. Besides, there is really no repugnancy at all. Basing himself on the provisions of sections 29 and 30, the Advocate-General contends that these two provisions show that the Act did not contemplate the payment of income-tax. This argument is entirely misconceived. It is hardly necessary for the Act to make a provision that tax, if chargeable, would be paid. In fact, the Companies Act which deals with companies does not make such a specific provision, though no one can seriously suggest that there would be repugnancy between the provisions of the Companies Act and the Income-tax Act. All that sections 29 and 30 purport to do is to provide for the administration of the funds vesting in the Corporation and their disposal. It is clearly far-fetched, if not fantastic, to suggest that these provisions are inconsistent with the liability to pay tax which is imposed by the Income-tax Act. The Advocate-General, no doubt attempted to derive some support to his argument by relying on section 43 of the State Financial Corporations Act, 1951 (LXIII of 1951), as well as section 43 of the Damodar Valley Corporation Act, 1948 (XIV of 1948). Section 43 which occurs in both the said Acts provides that the Corporation shall be liable to pay any taxes on income levied by the Central Government in the same manner and to the same extent as a company. It is urged that where the Legislature wanted to provide for the liability of the Corporation to pay the taxes on income levied by the Central Government, it has made specific provisions in that behalf and since no such provision has been made in the Act, it follows that the Legislature intended that no tax should be levied on the income earned by the Corporation established under the Act. We do not think there is any substance in the argument. The whole object which section 43 is presumably intended to achieve is to provide that the tax should be levied on the basis that the Corporation is a company and nothing more. If no such provision was made in the Act, that has no bearing on the liability of the Corporation to pay the tax on its income. Therefore, we are satisfied that the High Court was right in rejecting the argument that by virtue of the repugnancy between the material provisions of the Act and the charging section of the Income-tax Act, it should be held that the appellant was not liable to pay tax on its income.

The result is, the appeals fail and are dismissed with costs. One hearing fee.

V. S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The Central Bank of India, Ltd. (In all the Appeals) .. Appellant*

v.

P. S. Rajagopalan, etc. .. Respondents.

Industrial Disputes Act (XIV of 1947), section 33-C (2)—Scope—Right or benefit claimed by workman disputed by employers—Labour Court if can decide on and compute in terms of money—Power to interpret award or settlement—Section 36-A—Scope.

Section 33-C (2) of the Industrial Disputes Act takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers. The claim under section 33 (2) clearly postulates that the determination of the question about computing the benefit in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-section (2). The opening words of the sub-section "where such workman is entitled to receive from the employer any benefit" do not mean "where such workman is admittedly or admitted to be, entitled to receive such benefit".

As Maxwell has observed "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution".

Whereas section 33-C (2) deals with implementation of individual rights of workmen falling under its provisions, section 36-A deals merely with a question of interpretation of the award where a dispute arises in that behalf between the workmen and the employer and the appropriate Government is satisfied that the dispute deserves to be resolved by reference under section 36-A. For the purpose of making the necessary determination under section 33-C (2), it would, in appropriate cases be open to the Labour Court to interpret the award or settlement on which the workman's right rests.

Whether adding machine operators can claim special allowance, under the Sastry Award as "computists" will depend upon the Labour Court being satisfied that the work done by the adding machine operators can be reasonably treated as the work of computists as properly understood in the banking industry.

Appeals by Special Leave from the Order dated 7th March, 1962 of the Central Government Labour Court at Delhi in L.C.A. Nos. 246 to 249 of 1962.

M. C. Setalvad, Senior Advocate (N. V. Phadke and J. P. Thacker, Advocates and J. B. Dadachanji, O. C. Mathur, and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant (In all the Appeals).

A. V. Viswanatha Sastri, Senior Advocate (M. K. Ramamurthi, R. K. Garg, D. P. Singh and S. C. Agarwal, Advocates of M/s. Ramamurthi & Co., with him), for Respondents (In all the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, J.—This group of several appeals has been placed together for final disposal, because the appeals included in the group raise a common question of law in regard to the construction of section 33-C (2) of the Industrial Disputes Act, 1947 (XIV of 1947) (hereinafter called the Act). We propose to deal with this point in Civil Appeals Nos. 823 to 826 of 1962 which have been preferred by the appellant, the Central Bank of India, Ltd., against the respondents, its employees; and in accordance with our decision on the said point the other appeals included in this group would be dealt with on the merits.

Civil Appeals Nos. 823 to 826 of 1962 arise out of applications made by four respondents under section 33-C (2) of the Act. The case for each one of the respondents was that besides attending to his routine duties as clerk, he had been operating the adding machine provided for use in the clearing department of the Branch during the period mentioned in the list annexed to the petition and it was alleged that as such, he was entitled to the payment of Rs. 10 per month as special allowance for operating the adding machine as provided for under paragraph 164 (b) (1) of the

* C.A. Nos. 823 to 826 of 1962.

Sastry Award. On this basis, each one of the respondents made his respective claim for the amount covered by the said allowance payable to him during the period specified in the calculations.

The appellant disputed the respondents' claims. It urged three preliminary objections against the competence of the applications. According to it, the respondents could claim only non-monetary benefits under the Award that were capable of computation and so, section 33-C (2) was inapplicable to their claim. It was also contended that without a reference made by the Central Government, the applications were not maintainable, and it was pleaded that since the applications involved a question of the interpretation of the Sastry Award, they were outside the purview of section 33-C (2). On the merits, the appellant's case was that the special allowance claimed by the respondents was payable only to the Computists and could not be claimed by the respondents on the ground that they were operating adding machines. In support of this contention, the appellant alleged that a certain amount of manipulative skill is required for the handling of a comptometer since the operator has to execute a series of somewhat complex operations in quick succession before he can arrive at a result. The art of operating a comptometer has to be learnt over several months, but the work of operating the adding machine needs no special training and does not require even the skill which a typist has to show. That is why, according to the appellant, no special allowance could be claimed by the respondents under paragraph 164 (b) (1) of the Sastry Award.

The Central Government Labour Court before which these applications were made by the respondents overruled the preliminary objections raised by the appellant and on the merits, found that the respondents were entitled to claim the special allowance under the relevant clause of the Sastry Award. That is how the applications made by the respondents were allowed and the respective amounts claimed by them were ordered to be paid by the appellant. It is against this order that the appellant has come to this Court by Special Leave.

The principal contention which has been urged before us by the appellant is one of jurisdiction. It is argued that the Labour Court has exceeded its jurisdiction in entertaining the applications made by the respondents because the claims made by the respondents in their respective applications are outside the scope of section 33-C (2) of the Act. In dealing with this point, it is necessary to read section 33-C :

"(1) Where any money is due to a workman from an employer under a settlement or an award or under the provisions of Chapter V-A, the workman may without prejudice to any other mode of recovery, make an application to the appropriate Government for the recovery of the money due to him, and if the appropriate Government is satisfied that any money is so due, it shall issue a certificate for that amount to the Collector who shall proceed to recover the same in the same manner as an arrear of land revenue.

(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the appropriate Government, and the amount so determined may be recovered as provided for in sub-section (1).

(3) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the Labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case."

It is common ground that section 33-C (1) provides for a kind of execution proceedings and it contemplates that if money is due to a workman under a settlement or an award, or under the provisions of Chapter V-A, the workman is not compelled to take resort to the ordinary course of execution in the Civil Court, but may adopt a summary procedure prescribed by this sub-section. This sub-section postulates that a specific amount is due to the workman and the same has not been paid to him. If the appropriate Government is satisfied that the money is so due, then it is required to issue a certificate for the said amount to the Collector and that leads to the recovery of the said amount in the same manner as an arrear of land revenue. The scope and effect of section 33-C (1) are not in dispute before us.

There is also no dispute that the word "benefit" used in section 33-C (2) is not confined merely to non-monetary benefit which could be converted in terms of money, but that it takes in all kinds of benefits which may be monetary as well as non-monetary if the workman is entitled to them, and in such a case, the workman is given the remedy of moving the appropriate Labour Court with a request that the said benefits be computed or calculated in terms of money. Once such computation or calculation is made under section 33-C (2) the amount so determined has to be recovered as provided for in sub-section (1). In other words, having provided for the determination of the amount due to the workman in cases falling under sub-section (2), the Legislature has clearly prescribed that for recovering the said amount, the workman has to revert to his remedy under sub-section (1).

Sub-section (3) empowers the Labour Court to appoint a Commissioner for the purposes of computing the money value of the benefit, and it lays down that if so appointed, the Commissioner shall take such evidence as may be necessary and submit his report to the Labour Court. The Labour Court is then required to proceed to determine the amount in the light of the report submitted by the Commissioner and other circumstances of the case. This means that proceedings taken under sub-section (2) may be determined by the Labour Court itself or, in a suitable case, may be determined by it after receiving a report submitted by the Commissioner appointed in that behalf. It is clear that if for computing in terms of money the value of the benefit claimed by the workman, an enquiry is required to be held and evidence has to be taken, the Labour Court may do that itself or may delegate that work to a Commissioner appointed by it. This position must be taken to be well settled after the decision of this Court in the *Punjab National Bank, Ltd. v. K. L. Kharbanda*¹.

The question which arises for our decision is, however, slightly different. It is urged by the appellant that sub-section (2) can be invoked by a workman who is entitled to receive from the employer the benefit there specified, but the right of the workman to receive the benefit has to be admitted and could not be a matter of dispute between the parties in cases which fall under sub-section (2). The argument is, if there is a dispute about the workman's right to claim the benefit, that has to be adjudicated upon not under sub-section (2), but by other appropriate proceedings permissible under the Act, and since in the present appeals, the appellant disputed the respondents' right to claim the special allowance, the Labour Court had no jurisdiction to deal with their claim. In other words, the contention is that the opening words of sub-section (2) postulate the existence of an admitted right vesting in a workman and do not cover cases where the said right is disputed.

On the other hand, the respondents contend that sub-section (2) is broad enough to take in all cases where a workman claims some benefit and wants the said benefit to be computed in terms of money. If in resisting the said claim, the employer makes several defences, all those defences will have to be tried by the Labour Court under sub-section (2). On this argument all questions arising between the workmen and their employers in respect of the benefit which they claim to be computed in terms of money would fall within the scope of sub-section (2).

Before dealing with the question of construction thus raised by the parties in the present proceedings it would be material to refer briefly to the legislative history of this provision. The Act, as it was originally passed, made relevant provisions on the broad basis that industrial disputes should be adjudicated upon between Trade Unions or representatives of labour on the one hand and the workmen's employer's on the other. That is why section 10 (1) which deals with the reference of disputes to Boards, Courts or Tribunals, has been interpreted by this Court to mean that the disputes which are referable under section 10 (1) should be disputes which are raised by the Trade Unions to which the workmen belong or by the representatives of workmen acting in such a representative character. It was,

1. (1963) 2 S.C.J. 377 : (1962) 2 S.C.R. 977 : (1962) 1 L.L.J. 234.

however, realised that in denying to the individual employees a speedy remedy to enforce their existing rights, the Act had failed to give due protection to them. If an individual employee does not seek to raise an industrial dispute in the sense that he does not want any change in the terms and conditions of service, but wants only to implement or enforce his existing rights, it should not be necessary for him to have to take recourse to the remedy prescribed by section 10 (1) of the Act; that was the criticism made against the omission of the Act to provide for speedy enforcement of individual workman's existing rights. In order to meet this criticism, an amendment was made by the Legislature in 1950 by section 20 of the Industrial Disputes (Appellate Tribunal) Act, 1950 (XLVIII of 1950). Section 20 of this Act provided for recovery of money due from an employer under an award or decision. This provision filled up the lacuna which was discovered, because even after an award was made individual workmen were not given a speedy remedy to implement or execute the said award, and so, section 20 purported to supply that remedy. Section 20 (1) provided that if money was due under an award or decision of an industrial tribunal, it may be recovered as arrears of land revenue or as a public demand by the appropriate Government on an application made to it by the person entitled to the said money. Section 20 (2) then dealt with the cases where any workman was entitled to receive from the employer any benefit under an award or decision of an industrial tribunal which is capable of being computed in terms of money, and it provided that the amount at which the said benefit could be computed may be determined, subject to the rules framed in that behalf, by that industrial tribunal and the amount so determined may be recovered as provided for in sub-section (1). In other words, the provisions of section 20 (2) roughly correspond to the provisions of section 33-C (2) of the Act. There are, however, two points of distinction. Section 20 (2) was confined to the benefits claimable by workmen under an award or decision of an industrial tribunal; and the application to be made in that behalf had to be filed before the industrial tribunal which made the said award or decision. These two limitations have not been introduced in section 33-C (2). Section 20 (3) corresponds to section 33-C (3). It would thus be noticed that section 20 of this Act provides a speedy remedy to individual workmen to execute their rights under awards or decisions of industrial tribunals. Incidentally, we may add that section 34 of this Act made a special provision for adjudication as to whether conditions of service had been changed during the pendency of industrial proceedings at the instance of an individual workman and for that purpose inserted in the Act section 33-A. Act (XLVIII of 1950) by which section 20 was enacted came into force on 20th May, 1950.

In 1953, the Legislature took a further step by providing for additional rights to the workmen by adding Chapter V-A to the Act, and passed an Amending Act XLIII of 1953. Chapter V-A deals with the workmen's claims in cases of lay-off and retrenchment. Section 25 (1) which was enacted in this Chapter provided for the machinery to recover moneys due from the employers under this Chapter. It laid down, *inter alia*, that any money due from an employer under the provisions of Chapter V-A may be recovered in the same manner as an arrear of land revenue or as a public demand by the appropriate Government on an application made to it by the workman entitled to the said money. This was, of course, without prejudice to the workman's right to adopt any other mode of recovery. This provision shows that having created additional rights in the workmen in respect of lay-off and retrenchment the Legislature took the precaution of prescribing a speedy remedy for recovering the said amounts from their employers. This Amending Act came into force on 23rd December, 1953.

About three years later, the Legislature passed the Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956 (XXXVI of 1956). This Act repealed the Industrial Disputes (Appellate Tribunal) Act (XLVIII of 1950), section 25-I in Chapter V-A and inserted section 33-C (1), (2) and (3) and section 36-A in the Act. The result of these modifications is that the recovery provisions, are now contained in section 33-C and an additional provision is made by section 36-A which deals with cases where doubt or difficulty may arise in the

interpretation of any provision of an award or settlement. This Act came into force on 28th August, 1956.

In order to make the narration of the legislative background of section 33-C complete, we may refer to the fact that by the Amendment Act XVIII of 1957, two more provisions were added to Chapter V-A which are numbered as section 25-FF and section 25-FFF. This Act came into force on 6th June, 1957.

The legislative history to which we have just referred clearly indicates that having provided broadly for the investigation and settlement of industrial disputes on the basis of collective bargaining, the Legislature recognised that individual workmen should be given a speedy remedy to enforce their existing individual rights, and so, inserted section 33-A in the Act in 1950 and added section 33-C in 1956. These two provisions illustrate the cases in which individual workmen can enforce their rights without having to take recourse to section 10 (1) of the Act, or without having to depend upon their Union to espouse their cause. Therefore, in construing section 33-C we have to bear in mind two relevant considerations. The construction should not be so broad as to bring within the scope of section 33-C cases which would fall under section 10 (1). Where industrial disputes arise between employees acting collectively and their employers, they must be adjudicated upon in the manner prescribed by the Act, as for instance, by reference under section 10 (1). These disputes cannot be brought within the purview of section 33-C. Similarly, having regard to the fact that the policy of the Legislature in enacting section 33-C is to provide a speedy remedy to the individual workmen to enforce or execute their existing rights, it would not be reasonable to exclude from the scope of this section cases of existing rights which are sought to be implemented by individual workmen. In other words, though in determining the scope of section 33-C we must take care not to exclude cases which legitimately fall within its purview, we must also bear in mind that cases which fall under section 10 (1) of the Act for instance, cannot be brought within the scope of section 33-C.

Let us then revert to the words used in section 33-C (2) in order to decide what would be its true scope and effect on a fair and reasonable construction. When sub-section (2) refers to any workman entitled to receive from the employer any benefit there specified, does it mean that he must be a workman whose right to receive the said benefit is not disputed by the employer? According to the appellant, the scope of sub-section (2) is similar to that of sub-section (1) and it is pointed out that just as under sub-section (1) any disputed question about the workmen's right to receive the money due under an award cannot be adjudicated upon by the appropriate Government, so under sub-section (2) if a dispute is raised about the workmen's right to receive the benefit in question, that cannot be determined by the Labour Court. The only point which the Labour Court can determine is one in relation to the computation of the benefit in terms of money. We are not impressed by this argument. In our opinion, on a fair and reasonable construction of sub-section (2) it is clear that if a workman's right to receive the benefit is disputed, that may have to be determined by the Labour Court. Before proceeding to compute the benefit in terms of money, the Labour Court inevitably has to deal with the question as to whether the workman has a right to receive that benefit. If the said right is not disputed, nothing more needs to be done and the Labour Court can proceed to compute the value of the benefit in terms of money; but if the said right is disputed, the Labour Court must deal with that question and decide whether the workman has the right to receive the benefit as alleged by him and it is only if the Labour Court answers this point in favour of the workman that the next question of making the necessary computation can arise. It seems to us that the opening clause of sub-section (2) does not admit of the construction for which the appellant contends unless we add some words in that clause. The clause "Where any workman is entitled to receive from the employer any benefit" does not mean "where such workman is admittedly, or admitted to be, entitled to receive such benefit". The appellant's construction would necessarily introduce the addition of the words "admittedly, or, admitted to be" in that clause, and that clearly is

not permissible. Besides, it seems to us that if the appellant's construction is accepted, it would necessarily mean that it would be at the option of the employer to allow the workman to avail himself of the remedy provided by sub-section (2), because he has merely to raise an objection on the ground that the right claimed by the workman is not admitted, to oust the jurisdiction of the Labour Court to entertain the workman's application. The claim under section 33-C (2) clearly postulates that the determination of the question about computing the benefit in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-section (2). As Maxwell has observed

"where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution".

We must accordingly hold that section 33-C (2) takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers. Incidentally, it may be relevant to add that it would be somewhat odd that under sub-section (3), the Labour Court should have been authorised to delegate the work of computing the money value of the benefit to the Commissioner if the determination of the said question was the only task assigned to the Labour Court under sub-section (2). On the other hand, sub-section (3) becomes intelligible if it is held that what can be assigned to the Commissioner includes only a part of the assignment of the Labour Court under sub-section (2).

It is, however, urged that in dealing with the question about the existence of a right set up by the workman, the Labour Court would necessarily have to interpret the award or settlement on which the right is based, and that cannot be within its jurisdiction under section 33-C (2), because interpretation of awards or settlements has been specifically and expressly provided for by section 36-A. We have already noticed that section 36-A has also been added by the Amending Act XXXVI of 1956 along with section 33-C, and the appellant's argument is that the Legislature introduced the two sections together and thereby indicated that questions of interpretation fall within section 36-A and, therefore, outside section 33-C (2). There is no force in this contention. Section 36-A merely provides for the interpretation of any provision of an award or settlement where any difficulty or doubt arises as to the said interpretation. Generally, this power is invoked when the employer and his employees are not agreed as to the interpretation of any award or settlement, and the appropriate Government is satisfied that a defect or doubt has arisen in regard to any provision in the award or settlement. Sometimes, cases may arise where the awards or settlements are obscure, ambiguous or otherwise present difficulty in construction. It is in such cases that section 36-A can be invoked by the parties by moving the appropriate Government to make the necessary reference under it. Experience showed that where awards or settlements were defective in the manner just indicated, there was no remedy available to the parties to have their doubts or difficulties resolved and that remedy is now provided by section 36-A. But the scope of section 36-A is different from the scope of section 33-C (2), because section 36-A is not concerned with the implementation or execution of the award at all, whereas that is the sole purpose of section 33-C (2). Whereas section 33-C (2) deals with cases of implementation of individual rights of workmen falling under its provisions, section 36-A deals merely with a question of interpretation of the award where a dispute arises in that behalf between the workmen and the employer and the appropriate Government is satisfied that the dispute deserves to be resolved by reference under section 36-A.

Besides, there can be no doubt that when the Labour Court is given the power to allow an individual workman to execute or implement his existing individual rights, it is virtually exercising execution powers in some cases, and it is well

settled that it is open to the Executing Court to interpret the decree for the purpose of execution. It is, of course, true that the Executing Court cannot go behind the decree, nor can it add to or subtract from the provision of the decree. These limitations, apply also to the Labour Court; but like the Executing Court, the Labour Court would also be competent to interpret the award or settlement on which a workman bases his claim under section 33-C (2). Therefore, we feel no difficulty in holding that for the purpose of making the necessary determination under section 33-C (2), it would, in appropriate cases, be open to the Labour Court to interpret the award or settlement on which the workman's right rests.

We have already noticed that in enacting section 33-C the Legislature has deliberately omitted some words which occurred in section 20 (2) of the Industrial Disputes (Appellate Tribunal) Act, 1950. It is remarkable that similar words of limitation have been used in section 33-C (1) because section 33-C (1) deals with cases where any money is due under a settlement or an award or under the provisions of Chapter V-A. It is thus clear that claims made under section 33-C (1), by itself can be only claims referable to the settlement, award, or the relevant provisions of Chapter V-A. These words of limitation are not to be found in section 33-C (2) and to that extent, the scope of section 33-C (2) is undoubtedly wider than that of section 33-C (1). It is true that even in respect of the larger class of cases which fall under section 33-C (2), after the determination is made by the Labour Court the execution goes back again to section 33-C (1). That is why section 33-C (2) expressly provides that the amount so determined may be recovered as provided for in sub-section (1). It is unnecessary in the present appeals either to state exhaustively or even to indicate broadly what other categories of claims can fall under section 33-C (2). There is no doubt that the three categories of claims mentioned in section 33-C (1) fall under section 33-C (2) and in that sense, section 33-C (2) can itself be deemed to be a kind of execution proceeding; but it is possible that claims not based on settlements, awards or made under the provisions of Chapter V-A, may also be competent under section 33-C (2) and that may illustrate its wider scope. We would, however, like to indicate some of the claims which would not fall under section 33-C (2), because they formed the subject-matter of the appeals which have been grouped together for our decision along with the appeals with which we are dealing at present. If an employee is dismissed or demoted and it is his case that the dismissal or demotion is wrongful, it would not be open to him to make a claim for the recovery of his salary or wages under section 33-C (2). His demotion or dismissal may give rise to an industrial dispute which may be appropriately tried, but once it is shown that the employer has dismissed or demoted him, a claim that the dismissal or demotion is unlawful and, therefore, the employee continues to be the workman of the employer and is entitled to the benefits due to him under a pre-existing contract, cannot be made under section 33-C (2). If a settlement has been duly reached between the employer and his employees and it falls under section 18 (2) or (3) of the Act and is governed by section 19 (2), it would not be open to an employee, notwithstanding the said settlement, to claim the benefit as though the said settlement had come to an end. If the settlement exists and continues to be operative, no claim can be made under section 33-C (2) inconsistent with the said settlement. If the settlement is intended to be terminated, proper steps may have to be taken in that behalf and a dispute that may arise thereafter may have to be dealt with according to the other procedure prescribed by the Act. Thus, our conclusion is that the scope of section 33-C (2) is wider than section 33-C (1) and cannot be wholly assimilated with it, though for obvious reasons, we do not propose to decide or indicate what additional cases would fall under section 33-C (2) which may not fall under section 33-C (1). In this connection, we may incidentally state that the observations made by this Court in the case of *Punjab National Bank, Ltd.*¹, that section 33-C is a provision in the nature of execution should not be interpreted to mean that the scope of section 33-C (2) is exactly the same as section 33-C (1) (page 238).

1. (1963) 2 S.C.J. 377 : (1962) 2 S.C.R. 977 : (1962) 1 L.L.J. 234.

It now remains to refer to some decisions which are relevant. In *M/s. Kasturi & Sons (Private), Ltd. v. Shri N. Salivateeswaran and another*¹, where this Court was considering the question about the scope and effect of section 17 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955, (XLV of 1955), reference was made to the fact that the procedure prescribed by the said section 17 was different from the procedure prescribed by section 33-C (2), and it was observed that under the latter provision where an employee makes a claim for some money, an enquiry into the claim is contemplated by the Labour Court, and it is only after the Labour Court has decided the matter that the decision becomes enforceable under section 33-C (1) by summary procedure. No such enquiry was contemplated by the said section 17.

In *Shri Ambica Mills Co., Ltd. v. Shri S.B. Bhatt and another*², section 15 of the Payment of Wages Act (IV of 1936) fell to be construed, and it was held that under the said section, when the authority exercises its jurisdiction which is made exclusive by section 22, it has necessarily to consider various questions incidental to the claims falling thereunder, and it was added that although it would be inexpedient to lay down any hard and fast rule for determining the scope of such questions, care should be taken not to unduly extend or curtail its jurisdiction. As we have already indicated, we have adopted the same approach in interpreting section 33-C (2).

The respondents relied on the decision of the Bombay High Court in *M/s. Sawatram Ramprasad Mills Co., Ltd., Akola v. Baliram*³, in support of the very broad construction which they seek to place on the provisions of section 33-C (2). In that case, the High Court was dealing with a claim made under Chapter V-A of the Act, and there can be no doubt that such a claim together with all questions incidental to its decision can be properly determined under section 33-C (2). In reaching its conclusion, the High Court has no doubt made certain broad and general observations in regard to the scope of the jurisdiction conferred on the Labour Court under section 33-C (2). Those observations are in the nature of *obiter dicta* and in so far as they may be inconsistent with our present decision, they should be held to be not justified by the terms of section 33-C (2). In the result, the preliminary point raised by the appellant that the Labour Court had no jurisdiction to entertain the respondent's applications fails and must be rejected.

That takes us to the merits of the respondent's claim. We have already seen that the main basis on which the respondents have claimed the special allowance under paragraph 164 (b) (1) of the Sastry Award is that they have been operating upon the adding machines provided by the appellant for use in its clearing department. The appellant, however has contended that the special allowance can be claimed only by Comptists, and since the respondents had not even claimed that they are Comptists, their applications should be rejected. For deciding this dispute it is necessary to refer to the relevant provisions of the Sastry Award as they were modified by the decision of the Labour Appellate Tribunal. Chapter X of the Sastry Award deals with the problem of special allowance. In paragraph 161 of this Chapter, the Sastry Tribunal observed that there were certain posts even in the clerical and subordinate grades for which an incumbent requires special qualifications or skill for the efficient discharge of his duties, and so, it thought that an extra payment in such cases is necessary by way of recognition of and compensation for this special skill or responsibility. In paragraph 162, the Tribunal examined three alternatives suggested for its acceptance for making a provision for some special payment, and it ultimately decided that a special allowance should be paid to those categories of employees who, by their special qualifications or skill, deserve

1. (1958) S.C.J. 844 : (1958) 2 M.L.J. (S.C.) 130 : (1958) 2 An.W.R. (S.C.) 130 : (1958) M.L.J. (Cr.) 635 : (1959) S.C.R. 1.
 2. (1961) 1 S.C.J. 643 : (1961) 1 M.L.J. (S.C.) 198 : (1961) 1 An.W.R. (S.C.) 198 : (1961) 3 S.C.R. 220.
 3. 65 Bom.L.R. 91.

recognition. In paragraph 163, the Tribunal observed that the special allowance which it was about to prescribe was the minimum and it was open to the banks to pay higher allowance if they thought necessary to do so. Then followed paragraph 164 in which it specified 10 categories fit for special allowances. The first of these categories was Graduates and the claim of this category of employees was dealt with by the Tribunal in paragraph 164 (a). Paragraph 164 (b) deals with the remaining 9 categories and the Comptists are the first in these 9 categories. The Tribunal provided that the Comptists should receive Rs. 10 per month as special allowance in cases of all the four classes of banks A.B.C. and D. It is on this provision that the respondents rely in support of their claim.

When the Sastry Award went before the Labour Appellate Tribunal, the Labour Appellate Tribunal dealt with this question in paragraph 140 of its decision. The Tribunal observed that during the course of the hearing it became clear that the nomenclature by which particular categories of employees are described differed from bank to bank, and so, in order to avoid disputes between banks and their employees as to whether a particular category of employees is entitled to a special allowance under the Award or not, the Tribunal asked the banks to supply it with statements of different names given to the categories of employees for whom special allowances have been provided by the Sastry Award. Accordingly, some of the banks supplied the necessary information. The Tribunal then set out eight of the categories the equivalents of which had been supplied in the statements of the banks. As against the Comptists, Statement No. B-247 which had been supplied by the Imperial Bank of India, showed that the nomenclature adopted by the said Bank in respect of the said category was adding machine operators, addressographers. Having set out these equivalents, the Tribunal took the precaution of adding that the equivalents set out by it were helpful, but did not exhaust the subject and so, in the absence of data, it had to be left to the banks to pay the appropriate allowances having regard to the duties and responsibilities of a post. That is how the matter ended.

In the present proceedings, the respondents seem to base their case on the sole basis that they are operating the adding machines and can, therefore, be treated as adding machine operators, and they argued that since adding machine operators were equated in the statement of the Imperial Bank of India with Comptists, they must be held to be Comptists for the purpose of paragraph 164 (b) (i) of the Sastry Award and thus entitled to the special allowance of Rs. 10. In fact, in allowing the respondents' claim the Tribunal seems to have accepted this contention, for it has observed that according to the decision of the Labour Appellate Tribunal, the adding machine operators must be held to be in the same category as Comptists. In other words, the Tribunal appears to have taken the view that since the Imperial Bank of India described the employees who did the work of Comptists as adding machine operators, it followed that whenever any bank employee was operating on the adding machine for howsoever small a period it may be, he must be held to be a Comptist and as such entitled to the special allowance. In our opinion, this is clearly erroneous. It is true that the Imperial Bank of India adopted the nomenclature of adding machine operators for its Comptists and that may presumably be for the reason that at the relevant time, its Comptists were doing the work of adding machine operators and addressographers; so that it made no difference whether the bank called them Comptists or adding machine operators or addressographers, all the three types of work being entrusted to one category of employees: but however that may be, the nomenclature adopted by the Imperial Bank of India cannot be said to be binding on the other banks which did not adopt it, and so, it is obviously erroneous to hold that the equivalent adopted by the Imperial Bank of India must be taken to have been adopted by all the other banks. Indeed, the Award recently made by Mr. Justice Desai who was appointed the National Industrial Tribunal in the Bank Disputes clearly brings out the distinction between Comptists on the one hand, and adding machine operators, addressographers and photostat machine operators on the other in paragraphs 5.242 and 5.265.

In the present appeals, no evidence was led on behalf of the respondents. The appellant, however, examined its officer Mr. Shivodkar. This witness stated that an adding machine can be operated by a clerk with half an hour's practice. It only does additions mechanically. Operating a comptometer, however, involves complicated calculations and in order to handle it efficiently, the employee has to take three months' training and practising. He added that about two hours' work is put on the adding machine by the several respondents, but it is included in their normal working hours. There has been some discussion at the Bar in the present appeals as to the nature of the work which is done on the comptometer and on the adding machine but there can be no doubt that compared to the comptometer, the adding machine is a simple mechanism and for operating on it, not much experience or technical training is required; in fact it may not ever require that amount of skill and efficiency which is expected of a typist and it is significant that a claim made by the typists for special allowance was rejected by the Sastry Tribunal. That shows how the respondents' claim for special allowance as Comptists solely on the ground that they can be described as adding machine operators, cannot be sustained. Therefore, the sole basis on which the respondents' claim has been allowed by the Labour Court is unsound, and so the order passed by it cannot be affirmed.

It has, however, been urged before us by the respondents that they should be given an opportunity to substantiate their claims on the merits. It is argued that they were advised that the equivalent supplied by the Imperial Bank of India by itself furnished a firm basis for their claims, and so, no other allegations were made by them in the present proceedings and no evidence was led by them to prove the nature of the work done by them and the time for which they do the special kind of work to justify the claim for special allowance. On the other hand, the appellant has strenuously contended that the delay made by the respondents in making the present applications speaks for itself, and so, no indulgence should be shown to the respondents for remanding the present cases to the Labour Court once it is found that the basis on which the claim has been allowed is not justified in law. It is true that though the Sastry Award was passed in 1953 and the Labour Appellate Tribunal's decision was pronounced in 1954 and it became final on 21st October, 1955, the respondents did not make their claims until 1962. We have had occasion in the past to emphasise the fact that industrial adjudication should not encourage unduly belated claims; but, on the other hand, no limitation is prescribed for an application under section 33-C (2) and it would, on the whole, not be right for us to refuse an opportunity to the respondents to prove their case only on the ground that they moved the Labour Court after considerable delay. We would, therefore, set aside the order passed by the Labour Court and remand the proceedings to that Court with a direction that it should allow the parties to amend their pleadings if they so desire and to lead evidence in support of their respective cases. It may be open to the respondents to prove that they are doing the work which may be properly described as the work of Comptists. In that connection it may also be open to them incidentally to show that the work which was being done in the Imperial Bank of India by the adding machine operators who were shown as equivalents of the Comptists at the relevant time is being done by them in the appellant's branches. If the Labour Court is satisfied that the work done by the respondents can be reasonably treated as the work of Comptists as properly understood in the banking industry, then it should proceed to determine the respondents' claim on that basis. We have already referred to the fact that the Labour Appellate Tribunal made it perfectly clear that the particular nomenclature was not decisive and that what mattered in these cases was the nature of the duties and responsibilities of a post. If the nature of the duties and responsibilities of the posts held by the respondents legitimately justify the conclusion that they are Comptists, then the special allowance can be claimed by them. It is in the light of these observations that the Labour Court should proceed to deal with these cases after remand. If the parties want to amend their pleadings, they should move the Labour Court in that behalf within a fortnight after the receipt of the record in that Court. Then the Labour Court should fix an early

date for taking evidence and should deal with these matters as expeditiously as possible.

The result is, the appeals are allowed, the orders passed by the Labour Court are set aside and the matters sent back to that Court for disposal in accordance with law. There would be no order as to costs.

K.S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

The Canara Bank, Limited and others

.. *Appellants**

v.

Anant Narayan Surkund and others

.. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C (2)—Scope—Labour Courts jurisdiction where benefits claimed are not admitted by the employer—Sastry Award—"Cashiers-in-charge"—Interpretation.

Section 33-C (2) of the Industrial Disputes Act takes with in its purview cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employees. For the purpose of making the necessary determination under section 33-C (2), it would, in appropriate cases be open to the Labour Court to interpret the award or settlement on which the workmen's right rests.

The words "cashiers-in-charge" in clause (7) of paragraph 164 (b) of the Sastry Award, refers to charge of cash in the single lock and not charge of cash in the double lock. Where there is a single cashier in a branch who is doing both receiving and paying work he must be held in-charge of cash in the single lock. A sole clerk in the cash department doing both receiving and paying out cash must be held to be "cashier-in-charge of cash in a branch which includes "pay offices".

Appeals by Special Leave from the Order dated 16th March, 1962, and 14th February, 1962, of the Central Government Labour Court at Delhi in L.C.As. Nos. 212 of 1962 and 869-881 and 937-945 of 1961 respectively.

N. V. Phadke, Advocate and *S. N. Andley*, *Rameshwar Nath* and *P. L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, for Appellant (In C.A. No. 778 of 1962).

S. N. Andley, Advocate of *M/s. Rajinder Narain & Co.*, for Appellant (In C.As. Nos. 731 to 752 of 1962).

V. K. Krishna Menon, Senior Advocate, (*M. K. Ramamurthi*, *R. K. Garg*, *D.P. Singh* and *S. C. Agarwal*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Respondent (In C.A. No. 787 of 1962).

A. V. Viswanatha Sastri and *V. K. Krishna Menon*, Senior Advocates, (*M. K. Ramamurthi*, *R. K. Garg*, *D. P. Singh* and *S. C. Agarwal*, Advocates of *M/s. Ramamurthi & Co.*, with them), for Respondents (In C.As. Nos. 731 to 752 of 1962).

The Judgment of the Court was delivered by

Wanchoo, J.—These appeals by Special Leave arise from the orders of the Central Government Labour Court, Delhi, and will be dealt with together as they raise the same point. Appeals Nos. 731 to 752 are by the Canara Industrial and Banking Syndicate, Limited while Appeal No. 787 is by the Canara Bank, Limited. In all these appeals there were applications by the employees of the two banks under section 33-C (2) of the Industrial Disputes Act, XIV of 1947 (hereinafter referred to as the Act), which have been allowed by the Tribunal.

We shall give the facts in Appeal No. 787 in detail. The respondent in that appeal is a clerk employed by the bank at its Bandra Branch and has been working there since his appointment in October, 1953. The respondent claimed that he was entitled to a special allowance of Rs. 15 per month admissible to cashiers-in-charge of cash in pay offices in accordance with para. 164 (b) (7) of the All India Industrial Tribunal (Bank Disputes) Award, (popularly known as the Sastry Award). He further claimed that he worked as cashier-in-charge of cash at Worli and Bandra

* C.A. Nos. 787 and 731 to 752 of 1962.

branches of the bank and was entrusted with the sole charge of handling cash as there was nobody else to assist him. He was doing the work both of receiving and paying and was solely responsible in respect thereof to the bank. As such he was entitled to the special allowance of Rs. 15 per month under the Sastry Award, but the bank did not pay him the amount. The respondent therefore prayed that the benefit due to him may be computed in terms of money and necessary order passed thereon.

The bank resisted the claim of the respondent and its case was (firstly) that such an application was not entertainable under section 33-C (2) of the Act and the Labour Court had no jurisdiction to decide it, (secondly) that the respondent was working at a branch and not at a pay office and therefore was not entitled to any special allowance under para. 164 (b) (7) of the Sastry Award, and (thirdly) that in any case the respondent cannot be said to be a cashier-in-charge of cash at the branch where he was working and therefore was not entitled to any allowance. The bank's contention in this connection was that none of its employees was solely or singly in-charge of cash at any of its branches and therefore the respondent could not claim any special allowance, particularly as he was merely a routine clerk even though he was handling cash.

The Tribunal went into the evidence as to the duties of Shri A. N. Surkund, respondent, and found that the respondent was doing the combined work of both receiving and paying cash. It relied in this connection, on a decision of Shri Jeejeebhoy in a reference in *Dev Karan Nanjee Banking Co. v. Workmen*, under section 6 of the Industrial Disputes (Banking Companies) Decision Act, 1955, and held that as the respondent was the sole clerk in the branch doing the work of both receiving and paying cash and was thus in-charge of the cash of the branch, he would be entitled to the special allowance provided for cashiers-in-charge of cash at pay offices. It therefore passed an order in favour of the respondent.

There is no doubt that the respondent, Anant Narayan Surkund, was the sole paying and receiving clerk in the bank's branch and there was no other clerk working in the cash department. The *Manual of Instructions* issued by the bank shows exactly what the procedure is in the matter of dealing with cash. According to this *Manual*, at the commencement of the day's business, the bank's strong-room is opened by the Agent and the second key-holder who are in joint charge with independent keys, of what may be called the double lock. An estimate of the day's probable requirement is made and funds are withdrawn accordingly. The amount so withdrawn is taken by the shroff (*i.e.* paying-cum-receiving clerk). The box containing the shroff's overnight cash balance (single lock) is also taken out of the strong-room and is handed over to the shroff, who is to count the balance in the single lock box when receiving it in the morning. At the close of the day's business, the Agent takes over the cash held by the shroff. The cash under single lock is also to be checked in the presence of the shroff. Surplus cash is returned to the Agent and all entries in the shroff's cash book relating to sums taken out and placed in the double lock are initialled by the Agent.

These instructions show exactly what the shroff (*i.e.* paying-cum-receiving clerk) has to do during the course of the day. He receives first thing in the morning the amount in the single lock and such further sums as may be withdrawn from the double lock. He carries on both receiving and paying transactions during the course of the day with the help of the cash put at his disposal in the morning. At the end of the day he has to give an account to the Agent and if the Agent thinks that there is surplus cash after day's transactions he may withdraw the surplus cash from the single lock and put it in the double lock. Thus throughout the day the receiving-cum-paying clerk is in-charge of the cash in the single lock and has to account for it at the end of the day. There is no evidence in Appeal No. 787 as to who keeps the key of the single lock box, though in the other group of appeals where also the facts are similar, we have the further evidence that the key of the single lock box is kept by the paying-cum-receiving clerk, whose duties are the same as the duties of the shroff (*i.e.* paying-cum-receiving clerk) in Appeal No. 787. It

is on this evidence that we have to determine whether the Central Government Labour Court was right in coming to the conclusion to which it did.

The question whether such an application under section 33-C (2) of the Act was entertainable by the Labour Court and whether that Court had jurisdiction to decide it has been considered by this Court in *Central Bank of India Limited v. P. S. Rajagopalan*¹. It has been held there that an application of this kind is maintainable and therefore the contention of the banks in this behalf must fail.

We are further of opinion that there is no force in the second contention of the banks either. It is true that para. 164 (b) (7) of the Sastry Award speaks of cashiers-in-charge of cash at pay offices. We recognise that strictly speaking a branch of the bank is not the same thing as a pay office; but the question whether the provision of para. 164 (b) (7) would apply to a branch was referred to Shri Jeejeebhoy for clarification under section 6 of the Industrial Disputes (Banking Companies Decision) Act, 1955 (XLI of 1955) and Shri Jeejeebhoy held in 1959 that the use of the words "pay office" was not intended to have a restricted meaning referring only to those units which actually had the designation of pay office and would also apply to a branch in proper circumstances. Shri Jeejeebhoy who made this clarification was the Chairman of the Tribunal which heard the appeals from the Sastry Award and gave the decision which is known as the Labour Appellate Tribunal Decision (Bank Disputes). In these circumstances the clarification as it comes from such a Tribunal should be accepted, particularly as it has stood unchallenged since it was given in 1959. The contention of the banks therefore that para. 164 (b) (7) would not apply in the cases because these are cases of branches and not of pay offices must fail.

We now come to the merits of the case. The main dispute that has been raised in that connection is that cashiers with whom we are concerned are not cashiers-in-charge of cash. The principal reason given on behalf of the banks in this connection is that no single person is in-charge of cash in a branch and therefore the workmen concerned are not cashiers-in-charge. This argument in our opinion is disingenuous. What the banks contend is that the person in-charge of cash in a branch can only be the Agent and the second key-holder and no one else. There is no doubt that the overall charge of cash, securities, jewellery and everything else in the double lock of the bank is that of the Agent and the second key-holder; but that in our opinion does not dispose of the matter, for on that view there can be no cashier-in-charge of cash in a branch however responsible may be his duty. We cannot therefore accept the argument on behalf of the banks that unless the cashier holds one of the keys of the double lock he cannot be said to be in-charge of cash in the branch. Generally speaking, no cashier would be holding the second key of the double lock. That would generally be held by some officer subordinate to the Agent except in the case of very small branches where there is no officer other than the Agent. On this view the clarification made by Shri Jeejeebhoy to the effect that when clause (7) of para. 164 (b) used the words "pay offices" it included branches also would become practically useless, for as we have said above it would be a very small branch indeed where there would not be a second officer to act as the second key-holder of the double lock. We are, therefore, of opinion that when clause (7) of para. 164 (b) uses the words "cashiers-in-charge" it refers to charge of cash in the single lock and not charge of cash in the double lock, and it is in that view that we have to see whether the workmen concerned in the present appeals were in-charge of cash in the single lock.

On that point there can only be one answer in our opinion. We have already indicated the procedure that is in use in the branches with which we are concerned and that shows that the sole receiving-cum-paying clerk is the person in-charge of the single lock throughout the day when transactions are going on in the bank. He takes charge of the cash in the single lock first thing in the morning and gives over charge of the balance of cash in the single lock last thing in the day whereafter

the single lock box is put in the double lock. It is true that thereafter such a cashier is not in-charge of the cash in the single lock after the single lock box is put in the double lock and theoretically the Agent and the second key-holder are in-charge of the single lock box as they are in-charge of whatever else there is in the double lock. But when clause (7) of para. 164(b) refers to charge of cash it can only be such charge as is effective, *i.e.* during the day while transactions are going on in the bank. Therefore we are of opinion that where there is a single cashier in a branch who is doing both receiving and paying work he must on the strength of the procedure that has been given above be held in-charge of cash in the single lock within the meaning of clause (7). Our attention in this connection was drawn to the clarification made by Sri Jeejeebhoy where the cashier was concerned with other duties also besides being in-charge of cash in the sense which we have mentioned above. That may be so. But that in our opinion is immaterial, for clause (7) only speaks of charge of cash; it does not speak of charge of securities or jewellery, etc., that may be in the bank or of other duties. As soon as a person is in-charge of cash in a branch in the sense that he is the sole person in the cash department of the bank and is doing both receiving and paying work and takes charge of the cash in the single lock box first thing in the morning and makes over charge of the single lock box last thing in the evening, he must be held to be a cashier-in-charge of cash in a branch office. The evidence in the present cases shows that the clerks concerned take charge of the single lock box first thing in the morning. Each of them is the sole clerk in the cash department doing both receiving and paying out cash throughout the day when the bank is open and makes over charge of the single lock box at the end of the day whereafter the single lock box is kept in the double lock. In these circumstances these clerks must be held to be cashiers-in-charge of cash in a branch and as the words "pay offices" used in clause (7) have been clarified as including a branch these cashiers would be entitled to the special allowance mentioned in clause (7).

We may in this connection refer to para. 140 of the Labour Appellate Tribunal decision where after mentioning some equivalents the Appellate Tribunal said that it must be left to the banks to pay the appropriate allowances having regard to the duties and responsibilities of a post. The intention therefore of providing special allowance in para. 164 (b) was to give something over and above the basic pay to those clerks who had higher duties and responsibilities as compared to routine clerks. We are of opinion that the test is satisfied in the case of cashiers with whom we are concerned, for they being the sole persons in the cash department, they are in-charge of the cash in the single lock box during the working hours of the bank and their duties and responsibilities are obviously of higher nature than those of mere routine clerk.

Learned counsel for the appellants drew our attention to another part of para. 164 of the Sastry Award which mentions the categories of employees deserving special consideration and therefore fit for special allowance and those categories include cashiers (other than routine clerks). It is urged that when allowances were provided for cashiers in para. 164 (b), the intention was to exclude routine clerks in the cash department. These routine clerks in the cash department, it is urged, can be either paying clerks or receiving clerks or paying-cum-receiving clerks. Assuming that is so, it does not follow that clerks like the cashiers in the present cases were not intended to be entitled to a special allowance. The reason for this special allowance for cashiers was that they were in-charge of cash and that as we have explained, means that they should be in sole charge of the cash in the single lock box. Now routine clerks in the cash department may be paying clerks, receiving clerks or even paying-cum-receiving clerks; but they would not be entitled to any allowance unless it was shown that they were in sole charge of the cash in the single lock in the particular branch. That can only happen when there is a single clerk doing the work of both receiving and paying in the cash department of a branch, for then only it can be said that he is in sole charge of the cash in the single lock box of the bank during the working hours. The words "other than routine clerks" used in para. 164 (b) are made clear by four entries in the said paragraph, namely, clauses

3, 4, 5 and 6. These clauses provide for special allowance for head cashiers. Units of 5 clerks and above (clause 3), for head-cashiers, units of four clerks and below (clause 4), for assistant cashiers (above the level of routine clerks), units of 5 clerks and above (clause 5), and for assistant cashiers (above the level of routine clerks), units of four clerks and below (clause 6). These clauses will show that when the cash department consists of more than one person it is only one person, whether he is called the head-cashier or assistant cashier, who would be in-charge and would get an allowance and not the other clerks working in the cash department who may be doing either receiving work or paying work or even both paying and receiving work. The reason why the clerks in the present appeals are entitled to allowance is that they are the sole clerks doing both receiving and paying work and they have to take charge of the single lock box in the morning and are responsible for it throughout the day and make over charge of the single lock box in the evening when the bank closes for the day. It is only such sole clerks in the cash department of a branch who would be entitled to an allowance under clause (7) of para. 164 (b).

Again our attention is drawn to paras. 129 and 130 of the decision of the Labour Appellate Tribunal. It seems to have been urged before the Appellate Tribunal that receiving and paying cashiers should be granted special allowance; but that was rejected. It is urged that in view of this rejection it is not open to the workmen to urge that clerks like those with whom we are concerned in the present appeals are entitled to the allowance under para. 164 (b) (7). In the first place it appears to us on reading para. 130 that what was contemplated therein was receiving clerks and paying clerks and not receiving-cum-paying clerks. If that is so, the rejection of the allowance for receiving clerks and paying clerks will not affect the case of receiving-cum-paying clerks. But even if the words used include receiving-cum-paying clerks that does not again mean that receiving-cum-paying clerks who are in sole charge of cash should not get the allowance under para. 164 (b). It is clear to us that when the case of receiving-cum-paying clerks was rejected by the Appellate Tribunal it referred only to those receiving-cum-paying clerks who were not in-charge of cash, for it may be possible for a bank to have a receiving-cum-paying clerk along with (say) a head-cashier, and in such a case it is only the head-cashier who is entitled to the allowance as he would be the person in charge and supervising the work of other clerks.

Lastly it is urged that if this interpretation is put on para. 164 (b) (7), it will create some anomalies. It is pointed out in this connection that in clause (4) head-cashiers (units of four clerks and below) will get only Rs. 11 in B class banks and Rs. 8 in C class banks as special allowance while cashiers-in-charge of cash like the clerks in the present appeals would get Rs. 15 in a B class bank and Rs. 12 in a C class bank as allowance. We however find no anomaly in the fact that cashiers-in-charge of cash in pay offices (which words include branches) would get a little more as allowance than head-cashiers in clause (4) who have a unit of four clerks or less. It may well have been thought by the Sastry Tribunal that a sole cashier-in-charge of cash in a cash department doing both receiving and paying work may have greater responsibility than a head-cashier with four or less clerks below him. In any case this difference in the allowance cannot in our opinion affect the clear meaning of para. 164 (b) (7).

In Appeals Nos. 731-752, the facts are exactly the same with this addition that the sole clerk doing receiving as well as paying work in the branches of this bank further has the key of the single lock box always in his charge while in Appeal No. 787 there is no evidence as to who keeps the key of the single lock box after it is put in the double lock. That in our opinion makes no difference to the responsibility and in any case would be an added reason for the sole clerks in the cash department in Appeals Nos. 731 to 752 getting special allowance.

We therefore dismiss the appeals with costs. One set of hearing fee.

K.S.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P.B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

Canara Banking Corporation Ltd.

.. Appellant*

v.

U. Vittal

.. Respondent.

Industrial Disputes Act (XIV of 1947), section 33-A—Transfer of employee of bank to another branch outside the State or language area—Application for cancellation as offending terms of Sastry Award.

The direction in the Sastry Award that "even in case of workmen not belonging to the subordinate staff, as far as possible there should be no transfer outside the State or the language areas in which the employee has been serving except of course, with his consent" only required the bank to refrain from making such transfers as far as possible and did not prevent the bank from making such transfers where it was really found necessary in the bank's interests. It is not possible to consider this direction as amounting to absolute prohibition without ignoring the words "as far as possible". It cannot be said that transfers outside the State or language area can be made only with the consent of the employees. What that clause means is that with consent such transfers can of course be made, otherwise they should be avoided as far as possible. Where the bank claimed to have made the transfer in the interests of its business and was found to have acted *bona fide*, it should have been held by the Labour Court that the direction in the Sastry Award had not been contravened.

It would ordinarily be proper for industrial adjudication to accept as correct any submission by the management of the bank that an impugned transfer has been made only because it was found unavoidable. The one exception to this statement is where there is reason to believe that the management of the bank resorted to the transfer *mala fide*, by way of victimisation, unfair labour practice or some other ulterior motive, not connected with the business interests of the bank.

Appeal by Special Leave from the Order dated 5th March, 1962, of the Labour Court (Central), Ahmedabad, in Complaint No. 153 of 1961 in Reference No. 1 of 1960.

N.V. Phadke, Advocate and *S. N. Andley*, *Rameshwar Nath* and *P.L. Vohra*, Advocates of *M/s. Rajinder Narain & Co.*, for Appellant.

M. K. Ramamurthi, Advocate of *M/s. Ramamurthi & Co.*, for Respondent.

The Judgment of the Court was delivered by

Das Gupta, J.—This appeal by Special Leave is against the decision of the Labour Court, Ahmedabad, in an application by the respondent under section 33-A of the Industrial Disputes Act. The appellant is a banking company which has numerous branches all over Southern India. The respondent joined the service of the appellant-bank on 14th June, 1951, and after confirmation in September, 1952, was posted at Udipi. He was later transferred to Trichur; but on his representation was transferred to Mandvi Branch, Bombay, in July, 1956. On 20th May, 1961 another order of transfer was made by the appellant-bank posting the respondent back at Trichur. The present application under section 33-A was made on 26th August, 1961, praying that the transfer order of 20th May, 1961, be cancelled and the respondent permitted to continue at Bombay. It was alleged in the application that the appellant made the transfer order *mala fide* and as an act of victimisation for the lawful trade union activities of the complainant. It was also alleged that the transfer was made to deprive the complainant of his lawful dues.

This application was made before the National Industrial Tribunal at Bombay before which proceedings in respect of an industrial dispute between the appellant-bank and its workmen was then pending. The National Tribunal transferred the application to the Labour Court, Ahmedabad, for disposal. Before the Labour Court the appellant contended that there had been no contravention of the provisions of section 33 of the Industrial Disputes Act as no change had been made in the service conditions of the respondent's employment and further that the transfer had been made *bona fide* on account of sheer business considerations and exigencies of business. It was also contended that the order of transfer made by the bank did not offend the terms of the Sastry Award on the question of transfer of Bank employees. The Labour Court held that under the terms of the Sastry

Award the appellant's right to transfer his employees was limited to this extent that a clerk like the respondent could not be transferred outside the State or the language area in which he had been serving except with his consent. Holding that there had been no such consent, it came to the conclusion that the conditions of service of the respondent had been altered in a manner not in accordance with the standing order contained in the Sastry Award. Proceeding next on the assumption that the Sastry Award permitted the bank to transfer clerks outside the State or the language area when it was in the interests of the bank's business, it considered the question whether the bank had no other alternative but to transfer this particular clerk outside the State or the language area in which he had been serving, and came to the conclusion that this had not been established by the bank. The Court rejected the allegation that the transfer had been made to victimise the respondent for his union activities. Being of opinion however that by the transfer the appellant had materially altered the respondent's service conditions and this alteration was not in accordance with Sastry Award, the Court directed the bank to cancel the transfer order and to re-transfer the complainant to Mandvi Branch, Bombay. The bank has now appealed against this direction.

The relevant direction in the Sastry Award on the question of transfer is in these words :

"We direct that in general the policy should be to limit the transfers to minimum consistent with the banking needs and efficiency. So far as members of the subordinate establishment are concerned there should be no transfers ordinarily and if there are any transfers at all, they should not be beyond the language area of the person so transferred. We further direct that even in the case of workmen not belonging to the subordinate staff, as far as possible there should be no transfer outside the State or the language areas in which the employee has been serving except of course, with his consent."

It is not disputed that these directions were binding on the appellant-bank nor is it disputed before us that these directions amounted to "standing orders" applicable to bank's workmen within the meaning of section 33 (2) of the Industrial Disputes Act. It cannot also be doubted that the result of the transfer would be a material alteration in the respondent's conditions of service.

Two contentions are urged before us in support of the appeal. The first is that the Labour Court erred in thinking that the direction in the Sastry Award absolutely prohibited the bank from transferring workmen not belonging to the subordinate staff outside the State or the language area in which the employee had been serving except with his consent. On a proper construction, it was urged, the direction only required the bank to refrain from making such transfers as far as possible and did not prevent the bank from making such transfers where it was really found necessary in bank's interests. The second contention was that when the bank claimed to have made the transfer in the interests of its business and was found to have acted *bona fide*, it should have been held that the direction in the Sastry Award had not been contravened.

In our opinion, there is considerable force in both these contentions. It will be noticed that in making the directions as regards the transfer of workmen the Sastry Award drew a distinction between workmen belonging to the subordinate staff and others. As regards members of the subordinate staff the direction was to the effect that there should be no transfers ordinarily and there was absolute prohibition against transfers beyond the language area of the persons concerned. The words used for the purpose are..... "if there are any transfers at all, they should not be beyond the language area of the person so transferred." As regards, these workmen the award did not say that "as far as possible transfer should not be beyond the language area of the person so transferred." It is easy to see that here the prohibition was absolute. When they go on to consider the case of workmen not belonging to the subordinate staff, the members of the Tribunal however use markedly different language and preface the direction with the words "there should be no transfer outside the State or the language area in which he is serving except of course, with his consent" by the words "as far as possible." It is not possible to consider this direction as amounting to absolute prohibition without

ignoring the words "as far as possible." It is clear that these words were deliberately used to leave it to the banks to decide on a consideration of the necessities of its business interests whether a transfer of a workman not belonging to the subordinate staff outside the State or the language area in which he had been serving could be avoided or not, and directing that where possible it should be avoided. We are satisfied the Labour Court was in error in holding that transfers outside the State or the language area can be made only with the consent of the employees. What that clause means is that with consent such transfers can of course be made, otherwise they should be avoided as far as possible.

This brings us to the question whether in the present case the appellant contravened the direction in the award in transferring the respondent outside the Maharashtra State in which he was serving and also outside the language area in which he had been serving. It is necessary to remember in this connection that a bank which has branches in different parts of the country has to distribute its total man-power between these different branches in accordance with the needs of these branches and with an eye to its business interests. To attain the best results it becomes necessary to transfer workmen from one branch to another. The best interests of the bank may require at times that the transfer should be made outside the State or the language area in which a particular workman had formerly been employed. We have found above that the right of the bank to distribute its workmen not belonging to the subordinate staff to the best advantage, even though this may involve transfers outside the State or the language area in which a particular workman had been serving, was left unimpaired by the Sastry Award, except that such transfers have to be avoided, if they can be avoided without sacrificing the interests of the bank. The management of the bank is in the best position to judge how to distribute its man-power and whether a particular transfer can be avoided or not. It is not possible for industrial tribunals to have before them all the materials which are relevant for this purpose and even if these could be made available the tribunals are by no means suited for making decisions in matters of this nature. That is why it would ordinarily be proper for industrial adjudication to accept as correct any submission by the management of the bank that an impugned transfer has been made only because it was found unavoidable. The one exception to this statement is where there is reason to believe that the management of the bank resorted to the transfer *mala fide*, by way of victimisation, unfair labour practice or some other ulterior motive, not connected with the business interests of the bank.

In the present case the Labour Court has rejected the respondent's challenge to the *bona fides* of the management. It has held that there is no evidence whatever to support the complainant's allegation that he was transferred because he joined the Union and that the management had adopted a particular policy towards the workmen of the Union. We can find nothing that would justify us in interfering with the Labour Court's finding that these allegations have not been proved. It is true that the Labour Court has in considering the question whether the conditions of his service had been altered observed that the transfer "seems to be very unfair" to the employee. What it obviously means by this is that this transfer will work harshly on the employee. That may indeed be true. But that does not amount to a finding of unfair labour practice. In these circumstances the Labour Court was not justified in thinking that the respondent's transfer to Trichur could have been avoided without any injury to the bank's interests.

We have therefore come to the conclusion that the Labour Court has erred in holding that the transfer was not made in accordance with the "standing orders" regarding transfers as contained in the Sastry Award.

We therefore allow the appeal, set aside the order of the Labour Court and order that the respondent's application under section 33-A be rejected. There will be no order as to costs.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J.R. MUDHOLKAR, JJ.

Bachchoo Lal

.. Appellant*

v.

The State of Uttar Pradesh and another

.. Respondents.

United Provinces District Board Act (X of 1922), section 107—Scope—Lessee from District Board in respect of realisation of bayal and bazaar dues—Obstruction to employee of lessee—If offence.

Section 107 of the U. P. District Board Act speaks of obstruction or molestation of two classes of persons. One class of persons consists of persons employed by the District Board under the Act. A lessee in respect of realisation of bayal and bazaar dues in a town from the District Board or his employee (engaged by that lessee to collect such dues) is not an employee of the District Board. The second class of persons consists of those who are under contract with the Board under the Act. Surely, the person under contract with the Board is the lessee himself and not any one employed by that lessee to collect the dues. Section 107 of the Act does not make obstruction or molestation of an employee of the person under contract with the Board an offence.

Appeal from the Judgment and Order dated 3rd May, 1961, of the Allahabad High Court in Criminal Appeal No. 381 of 1960.

O.P. Rana, Advocate, for Appellant.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—Raja Kamalakar Singh of Shankargarh, U. P., took a lease from the District Board, Allahabad, with respect to the realisation of bayal and bazaar dues on the sale of commodities in the bazaar of Shankargarh. Bachchoo Lal was his employee to collect these dues. On 13th April, 1959, Bahadur Singh, a peon of the Raja Sahib, asked Shyam Lal Kurmi, P.W.-2, who had sold two bullock load of linseed to Mewa Lal, respondent No. 2, in that bazaar, to accompany him to the Munim in order to pay the bayal dues there. Mewa Lal asked Shyam Lal not to pay those dues. The peon, however, took Shyam Lal to Bachchoo Lal, appellant, at the grain godown. Mewa Lal, armed with a lathi, came there and on Bachchoo Lal's asking him as to why he was creating obstruction in the realisation of the dues, filthily abused him and threatened to break his hand and feet and kill him. Bachchoo Lal, thereafter, instituted a complaint against Mewa Lal, on obtaining sanction of the District Magistrate for prosecuting Mewa Lal for an offence under section 107 of the United Provinces District Board Act, 1922 (U.P. Act No. X of 1922), hereinafter called the Act.

The trial Magistrate, the II Class Tahsildar Magistrate of Karchana, convicted Mewa Lal of the offences under sections 504 and 506, Indian Penal Code and also of an offence under section 107 of the Act. On appeal, the Sessions Judge, Allahabad, acquitted Mewa Lal holding that proper authority in favour of Bachchoo Lal for prosecuting Mewa Lal under section 107 of the Act had not been proved, that the Magistrate had no jurisdiction to try an offence under section 506, Part II, Indian Penal Code which was triable by a Magistrate of the I Class, and that the prosecution case under section 504, Indian Penal Code, was suspicious. Bachchoo Lal filed an appeal against the acquittal of Mewa Lal, after obtaining the permission of the High Court under sub-section (3) of section 417 of the Code of Criminal Procedure, hereinafter called the Code. The High Court dismissed the appeal repelling the contentions for the appellant to the effect that the appellant, being the complainant and therefore a party to the criminal case against Mewa Lal, ought to have been given notice of the appeal by the Sessions Judge and also ought to have been given an opportunity to be heard and that such notice and opportunity of hearing were necessary on the principles of natural justice and in view of the fact that section 417 (3) of the Code conferred a substantive right of appeal on the complainant. The High Court further held that though the Sessions Judge was wrong in holding that the sanction required by section 182 of the Act had not been

proved, the sanction was in the name of Raja Sahib of Shankargarh and not of Bachchoo Lal and therefore the complaint was not a valid complaint and that the Raja Sahib could not collect Tah Bazari through his agents. It also held that the acquittal of the accused of the offence under section 506, Indian Penal Code, was justified and that the acquittal of the offence under section 504, Indian Penal Code, could not be said to be erroneous and that in any case the matter was too petty for interfering with an order of acquittal even if it had taken a different view of facts from the one taken by the Sessions Judge. The High Court, accordingly, dismissed the appeal. Bachchoo Lal has preferred this appeal after obtaining the requisite certificate from the High Court under Article 134 (1) (c) of the Constitution. The State of U.P. is the first respondent and Mewa Lal, the accused, is respondent No. 2.

Three questions have been raised on behalf of the appellant. One is that the Assistant Sessions Judge ought to have issued a notice of the hearing of the appeal to the appellant on whose complaint Mewa Lal was convicted by the Magistrate and against which order of conviction he had filed an appeal. No such notice was issued to him and therefore the order of the Assistant Sessions Judge acquitting Mewa Lal was not a good order. The second contention is that the High Court was wrong in holding that the Raja of Shankargarh could not collect the Tah Bazari dues through his agents. The third contention is that Bachchoo Lal had requisite sanction under section 182 of the Act for prosecuting Mewa Lal and, therefore, the finding to the contrary is wrong.

The third contention is correct. The requisite authority under section 182 of the Act is in favour of not only the Raja of Shankargarh, but also in several of his employees including Bachchoo Lal, the appellant.

We need not express an opinion on the second contention as we do not know the terms of the lease executed by the District Board in favour of the Raja of Shankargarh and as we are not concerned with the civil rights with respect to the manner of collecting the dues which he could collect under the lease. We are, however, of opinion that section 107 does not make obstruction or molestation of an employee of the person under contract with the Board an offence.

Section 107 of the Act reads :

"Whoever obstructs or molests a person employed by, or under contract with, the Board under this Act in the performance of his duty or in the fulfilment of his contract, or removes a mark set up for the purpose of indicating any levels or direction necessary to the execution of works authorized by this Act, shall be liable on conviction to a fine which may extend to fifty rupees."

The section speaks of the obstruction or molestation of two classes of persons. One class of persons consists of persons employed by the District Board under the Act. The Raja of Shankargarh or Bachchoo Lal is not an employee of the District Board. The second class of persons consists of those who are under contract with the Board under the Act. Surely, the person under contract with the Board is the Raja of Shankargarh and not Bachchoo Lal. Bachchoo Lal is only an employee of the Raja.

We did not hear the learned counsel on the merits of the case under section 504 of the Code and accept the finding of the Courts below.

In view of the considerations mentioned, no interference is possible with the acquittal of the respondent No. 2 on merits. It is, therefore, not necessary to decide the first question raised for the appellant.

We accordingly dismiss the appeal.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—A.K. SARKAR, M. HIDAYATULLAH AND J.C. SHAH, JJ.

Rajabhai Abdul Rahman Munshi

.. Appellant*

v.

Vasudev Dhanjibhai Mody

.. Respondent.

Constitution of India, 1950, Article 136—Appeal by Special Leave to Supreme Court—Discretionary jurisdiction—Exercised in exceptional cases to remedy serious injustice—Leave to appeal—Duty of applicant to disclose true facts—Withholding information and misleading the Court—Special Leave liable to be revoked.

The plaintiff landlord filed a suit against the defendant tenant for an order in ejectment on the ground of default. The trial Judge after taking note of Rs. 400 deposited in a previous suit held the arrears of rent had been deposited and consequently dismissed the suit. In appeal the appellate Court excluded the amount of Rs. 400 on the ground that the deposit had been withdrawn by the defendant before the second suit was disposed of and passed a decree in ejectment. On Revision to the High Court, it was contended that there were no materials on record to show that Rs. 400 was so withdrawn. The High Court upheld the contention but dismissed the petition refusing to exercise its discretion in favour of the defendant. The Special Leave Petition proceeded on the correctness of the finding of the High Court as to the deposit of Rs. 400 and seeking relief on that basis. Counsel in the Supreme Court admitted that the deposit of Rs. 400 was withdrawn before the suit was disposed of. On the question whether the Special Leave should not be revoked :

Held :—Exercise of the jurisdiction of the Court under Article 136 of the Constitution is discretionary ; it is exercised sparingly and in exceptional cases, when a substantial question of law falls to be determined or where it appears that interference by this Court is necessary to remedy serious injustice. A party who approaches the Supreme Court invoking the exercise of this overriding discretion of the Court must come with clean hands. If there appears on his part any attempt to overreach or mislead the Court by false or untrue statements or by withholding true information which would have a bearing on the question of exercise of the discretion, the Court would be justified in refusing to exercise the discretion or if the discretion has been exercised, in revoking the leave to appeal granted even at the time of hearing of the appeal.

A party who approaches the Court knowing or having reason to believe that if the true facts were brought to its notice this Court would not grant Special Leave, withholds that information and persuades this Court to grant leave to appeal is guilty of conduct forfeiting all claims to the exercise of discretion in his favour. It is his duty to state facts which may reasonably have a bearing on the exercise of the discretionary powers of this Court. Any attempt to withhold material information would result in revocation of the order, obtained from this Court. The duty of an applicant for Special Leave to this Court is not discharged when he merely summarises the judgment of the Courts below and claims relief on the footing that the findings are correct, when to his knowledge the findings cannot be sustained and the findings have been so recorded because the Courts below have been misled on account of representations for the making of which he was either directly or indirectly responsible.

If however, the defendant has by misleading the Court obtained an order granting Special Leave and has under the protection of that order remained in possession of the property in dispute for a period of three years, it would be putting a premium upon the unfair conduct of the defendant to permit him to argue the appeal on some footing other than that on which the case was argued in the High Court and to argue which presumably no Special Leave would have been granted.

Per Hidayatullah, J.—The powers exercisable by this Court under Article 136 of the Constitution are not in the nature of a general appeal. They enable this Court to interfere in cases where an irreparable injury has been caused by reason of a miscarriage of justice due to a gross neglect of law or procedure or otherwise and there is no other adequate remedy. The Article is hardly meant to afford relief in a case of this type where a party is in default of rent because he withdrew a deposit lying in Court but who cannot, on the record of the case, be shown to have withdrawn the amount. If the petition had mentioned that the decision of the appeal Court had proceeded on the ground that the amount was taken out, it is difficult to imagine that this Court would have given Special Leave to decide a question of discretion.

Appeal by Special Leave from the Judgment and Decree dated 20th January, 1960 of the Bombay High Court in Civil Revision Application No. 139 of 1958.

J.P. Mehta and Aziz Mushabber Ahmadi, Advocates and J. B. Dadachanji, O.C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Appellant.

Vithal, B. Patel and I.N. Shroff, Advocates, for Respondent.

The Court delivered the following judgments—

Shah, J.—(for himself and *Sarkar, J.*)—For reasons which we will presently set out, Special Leave to appeal against the judgment of the High Court of Bombay granted by this Court must be vacated because it had been procured by the appellant without disclosing all the material facts.

Rajabhai Munshi who will hereinafter be referred to as 'the defendant' is since 1935 a tenant of Vasudev Mody—hereinafter "called the plaintiff"—in respect of a piece of land situate in the town of Ahmedabad. The rent of the land as originally stipulated was Rs. 411 per annum, and it was by mutual agreement enhanced to Rs. 851 per annum in 1948. The plaintiff filed Suit No. 2014 of 1952 against the defendant in the Court of Small Causes exercising jurisdiction under section 28 of the Bombay Rents and Lodging House Rates (Control) Act, 1947 (Act LVII of 1947) for an order in ejectment against the defendant on the plea amongst others that the latter had made default in payment of rent due by him. The defendant contended *inter alia* that the rent stipulated was in excess of the standard rent payable by him. The Trial Court assessed the standard rent payable by the defendant at Rs. 446 per annum and holding that the defendant had not made default in paying rent, dismissed the plaintiff's suit. Against that decree the plaintiff preferred Appeal No. 450 of 1953 to the District Court at Ahmedabad. On 1st October, 1954, the defendant deposited in the District Court Rs. 400 to the credit of the plaintiff. The appeal instituted by the plaintiff was not prosecuted, and the amount of Rs. 400 deposited to the credit of the plaintiff remained deposited in Court.

The plaintiff commenced another action (Suit No. 3484 of 1955) against the defendant on the plea that the defendant had committed fresh defaults in payment of rent. The defendant deposited in Court from time to time between 22nd November, 1955, and 16th January, 1957, Rs. 2,126-8 towards rent due by him and costs of the suit. The learned Trial Judge by his order dated 26th February, 1957, held that taking into account Rs. 400 lying to the credit of the plaintiff in Appeal No. 450 of 1953 the defendant had deposited in Court Rs. 2,526-8 and that amount was sufficient to satisfy the arrears of rent due by the defendant and also the costs of the suit, and therefore no decree in ejectment could, in view of section 12 (3) (b) of Bombay Act LVII of 1947 be granted.

In appeal the Extra Assitant Judge, Ahmedabad, reversed the decree of the Trial Court. In his view the defendant had failed to deposit the full amount of rent due and costs of the suit as required by section 12 (3) (b) and therefore a decree in ejectment must issue against the defendant. In making up the account of the rent due by the defendant, the learned Judge excluded the amount of Rs. 400 deposited in Appeal No. 450 of 1953 on 1st October, 1954, because the defendant had withdrawn that amount before the suit was disposed of by the Trial Court. Against the decree in ejectment the defendant invoked the revisional jurisdiction of the High Court of Judicature at Bombay. Before the High Court the Advocate for the defendant contended that there was no evidence in support of the finding of the appellate Court that the amount of Rs. 400 deposited by the defendant in Appeal No. 450 of 1953 stood withdrawn by the defendant. The High Court upheld the contention but proceeded to dismiss the petition filed by the defendant because the case did not fall strictly within section 12 (3) (b) of Bombay Act LVII of 1947 and the Court had jurisdiction, having regard to the circumstances and the conduct of the tenant, to refuse relief to him, and that the record showed that the defendant had by his conduct disentitled himself to discretionary relief. Against the order passed by the High Court, a petition for Special Leave to appeal to this Court was granted.

Section 12 (1) of Act LVII of 1947 provides :

"A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act."

and sub-section (3), clause (b) provides that :

"In any other case, no decree for eviction shall be passed in any such suit, if, on the first day of hearing of the suit, or on or before such other date as the Court may fix, tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit as directed by the Court."

It is common ground that the claim made by the plaintiff falls within the description "In any other case". The High Court assumed that even if the tenant has not paid into Court the standard rent and permitted increases due on the first day of hearing of the suit, the Court may still in the exercise of its discretion refuse a decree to the landlord in ejectment, provided all the arrears of rent and costs of the suit are paid into Court by the tenant at any time before the suit is disposed of. The assumption so made at once raised a question of some nicety as to the true interpretation of section 12 (3) (b). This question may however fall to be determined only if the conclusion of the High Court that the defendant had deposited the rent due and the costs of the suit before the date of the decree passed in the Trial Court be correct. The Appellate Court had recorded that the rent due and costs of the suit were not deposited by the defendant, and therefore the defendant could not be relieved against the consequences of his default. In taking account of the amounts deposited, the learned Judge excluded the amount of Rs. 400 deposited in Appeal No. 450 of 1953 which had been withdrawn by the defendant on 19th January, 1957. It is common ground before us, that Rs. 400 deposited by the defendant in Appeal No. 450 of 1953 had in fact been withdrawn by him before the date of decree of the Trial Court. Counsel for the defendant admits that fact, and it is supported by a certified extract from the file of the District Court. At the hearing before the High Court, the Advocate for the defendant pleaded that the finding of the Extra Assistant Judge that the amount of Rs. 400 was withdrawn before the decree of the Trial Court was not supported by evidence. We are prepared to hold that the Advocate was not instructed about the withdrawal of the amount, and no attempt was made by him to mislead the Court, and no blame need attach in this matter to the Advocate in that behalf. But the defendant was guilty of withholding information from the Court as well as his Advocate.

In the petition for Special Leave, which is sworn by the defendant a deliberate attempt has been made not merely to withhold from the Court the information that the amount of Rs. 400 originally deposited by the defendant was withdrawn by him, but sedulously attempt is made to create an impression that the finding of the High Court concerning the withdrawal was correct, and of the Extra Assistant Judge wrong, and to argue that because of the amounts deposited by him inclusive of Rs. 400, the defendant was entitled to the protection of sub-sections (1) and (3) (b) of section 12. A bare perusal of paragraphs 14, 19, 20, 23 and 25 of the petition for Special Leave, leaves no room for doubt that this was the object of the defendant. It was submitted in the petition that the defendant's case fell strictly within the terms of section 12 (3) (b) and that the High Court was in error in holding that it had any discretion to refuse relief to the defendant, after the defendant complied with the terms of that sub-section in the matter of deposit. The petition was sworn by the defendant. He has affirmed that the facts stated in paragraphs 1 to 32 were true to his own knowledge and the submissions made therein were believed by him to be true, and *that the petition concealed nothing nor was any part of it false or untrue*. He also affirmed in his affidavit that he had "instructed counsel in the Courts below and that" he was "instructing counsel in this Court in respect of the Special Leave petition." The findings of the High Court on a question of fact which to the knowledge of the defendant was erroneous, was made the foundation of what was asserted to be a substantial question of law of general or public importance. If the High Court was not persuaded to take the view which it did in the matter of the deposit of Rs. 400 no further question would have survived; at least none such appears to have been argued.

Counsel for the plaintiff has urged that this Court would not have granted Special Leave to appeal if the defendant had informed the Court that the amount of Rs. 400 which was represented to be lying to the credit of the plaintiff was not in fact available at the date of the decree in the Trial Court, because the question as to the interpretation of section 12 (3) (b) would not on the true facts fall to be determined, and Special Leave should be revoked because it has been procured by deliberately misleading the Court on a matter of importance.

There is a restricted right of appeal to this Court conferred by the Constitution upon litigants in civil cases. Where the amount or value of the subject-matter in dispute in the Court of the first instance and in appeal to this Court is not less than Rs. 20,000, or where the judgment, decree or final order involve directly or indirectly some claim or question respecting property of like amount or value, and the judgment, decree or final order made by a Division Bench of the High Court does not affirm the judgment of the Court immediately below, the party aggrieved is entitled as of right to appeal. An appeal may also lie in civil disputes with certificate by the High Court under Article 133 (1) (c) that the case is a fit one for appeal, or with Special Leave under Article 136 of the Constitution. The High Court has not granted certificate under Article 133 (1) (c) as it could not in view of the Constitutional prohibition in clause (3) of Article 133. Exercise of the jurisdiction of the Court under Article 136 of the Constitution is discretionary : it is exercised sparingly and in exceptional cases, when a substantial question of law falls to be determined or where it appears that interference by this Court is necessary to remedy serious injustice. A party who approaches this Court invoking the exercise of this over-riding discretion of the Court must come with clean hands. If there appears on his part any attempt to overreach or mislead the Court by false or untrue statements or by withholding true information which would have a bearing on the question of exercise of the discretion, the Court would be justified in refusing to exercise the discretion or if the discretion has been exercised in revoking the leave to appeal granted even at the time of hearing of the appeal. In *Har Narain v. Badri Das*¹, Gajendragadkar, J., speaking for the Court observed :

“It is of utmost importance that in making material statements and setting forth grounds in applications for Special Leave, care must be taken not to make any statements which are inaccurate, untrue or misleading.”

In that case the Court revoked the leave granted because the appellant had made certain inaccurate and misleading statements in his petition for leave to appeal to this Court. Those statements were, in the view of the Court, misrepresentations of fact and the Court being satisfied that the appellant had deliberately made those misleading and untrue statements revoked the leave. In another case which was brought to this Court with Special Leave *S.R. Shetty v. Phirozeshah Nurusserwanji Colabawalla and another*², an attempt was made by the appellant in the petition for Special Leave to value the property in dispute at more than Rs. 20,000 when in fact he had valued the same property in another litigation at Rs. 500. The Court in revoking the leave observed :

“The appellant deliberately chose to inflate the valuation of the property so as to obtain the Special Leave. We have no doubt that if this Court had been apprised of the true valuation, which according to the appellant himself was only Rs. 503, this Court would not have granted the Special Leave. We cannot, therefore, condone this deliberate attempt to mislead the Court in respect of a very material question, namely, the value of the property in dispute.”

Counsel for the defendant has conceded that the amount of Rs. 400 which was deposited on 1st October, 1954 had been withdrawn by the defendant before the date of judgment in the Trial Court. He, however, contended that the defendant had not instructed his Advocate in the High Court to raise the contention about the availability of Rs. 400 to the plaintiff, which met with the approval of the High Court and the contention was raised by the Advocate on his own initiative. Counsel

1. Since reported in (1964) 1 S.C.J. 51. 1963.

2. C.A. No. 155 of 1963 decided on 5th April,

further submitted that a party applying to this Court for Special Leave is entitled to restrict himself to what appears on the record and in the present case the defendant has correctly set out the finding of the High Court and has founded an argument on that finding. Implicit in the submission of Counsel for the defendant is the suggestion that it is open to party to mislead the High Court or the Subordinate Court and thereafter approach this Court after withholding material information within his knowledge which would have seriously affected his right to move this Court, for the exercise of discretion in his favour. We cannot overemphasize the fact that the jurisdiction of this Court is discretionary. This Court is not bound to grant Special Leave merely because it is asked for. A party who approaches the Court knowing or having reason to believe that if the true facts were brought to its notice this Court would not grant Special Leave, withholds that information and persuades this Court to grant leave to appeal is guilty of conduct forfeiting all claims to the exercise of discretion in his favour. It is his duty to state facts which may reasonably have a bearing on the exercise of the discretionary powers of this Court. Any attempt to withhold material information would result in revocation of the order obtained from this Court. We are unable to agree with Counsel for the defendant that the duty of an applicant for Special Leave to this Court is discharged when he merely summarises the judgment of the Courts below and claims relief on the footing that the findings are correct, when to his knowledge the findings cannot be sustained and the findings have been so recorded because the Courts below have been misled on account of representations for the making of which he was either directly or indirectly responsible. In our judgment the petition filed before this Court was misleading.

Counsel for the defendant also submitted that he was prepared to argue the appeal on the footing that the High Court was in error in reversing the judgment of the District Court on the question about the withdrawal of Rs. 400. If, however, the defendant has by misleading the Court obtained an order granting Special Leave and has under the protection of that order remained in possession of the property in dispute for a period of three years, it would be putting a premium upon the unfair conduct of the defendant to permit him to argue the appeal on some footing other than that on which the case was argued in the High Court, and to argue which presumably no Special Leave would have been granted.

Special Leave to appeal is therefore revoked. The appellant will pay costs of the appeal to the respondent.

Hidayatullah, J.—I agree that we should recall the Special Leave. As this is the second case in a few days, I wish to say a few words. The appellant before us is the tenant and the respondent is the landlord. One of the questions in the case was whether the tenant was in default of rent and revenue tax specially payable by him. It appears that litigation between the parties has been going on for years. The landlord was forced to file suits for ejectment on the ground that the tenant had not paid the rent. The tenant also never paid rent except in Court. In the earlier rounds, the tenant has succeeded by making deposits of rent and costs at the last moment, thus, taking advantage of the Bombay Act (LVII of 1947).

It appears that one such suit of the landlord was No. 2014 of 1952. During the appeal arising from the decree in that suit, the tenant had deposited on 1st October, 1954, a sum of Rs. 400 in the appeal Court and had sent a notice to the landlord about this deposit. This deposit lay in Court till 19th January, 1957, when it was withdrawn. The last date is important.

The present suit was filed on 8th September, 1955, for eviction of the tenant on the ground that he was in arrears from 9th June, 1953. On 10th January, 1957, the tenant deposed about the deposit and questioned the landlord about the notice, but before the case was over, he withdrew the deposit. The learned Judge, Small Cause Court, Ahmedabad, held the point of sub-letting against the landlord, and holding further that the deposit of Rs. 2,126-8-0 made by the tenant in his Court was

sufficient to cover the arrears, and that taken with the deposit of Rs. 400, the amount came to Rs. 2,516-8-0 dismissed the suit. This was on 26th February, 1957.

In the appeal filed by the landlord, the accounts between 9th June, 1953 and 26th February, 1957 were recast. It seems that it was pointed out to the appeal Court that the tenant had withdrawn the deposit of Rs. 400. The judgment took this fact into consideration and held the tenant to be in arrears and ordered his eviction. The tenant filed a revision application in the High Court and claimed that as the amount of Rs. 400 was in deposit and at the landlord's disposal, he could not be held to be in default. His Counsel made the point that there was nothing on record to prove that the amount was withdrawn. The High Court held that this was so but held that it had a discretion in the matter and the tenant by his conduct over the years had deprived himself of any consideration. The application for revision was dismissed.

In applying for Special Leave against the order of the High Court, the tenant quoted a long extract from the judgment of the High Court where it spoke of this deposit, and then went on to say :

"The petitioner submits that the High Court was correct in coming to the conclusion that as there was nothing on record to show that the petitioner had withdrawn the sum of Rs. 400 deposited by him in the earlier appeal, the petitioner was not in arrears of rent and had paid the costs at the date of the judgment."

This allegation was supported by the usual affidavit which stated that the facts in the petition were true and that the petition concealed nothing. Strictly speaking, the facts were as they were pleaded in the petition, but there was more. There was one fact particularly within the knowledge of the tenant and it was that he had withdrawn the amount on 19th January, 1957, and he was in default even before the judgment of the Court of first instance was given on 26th February, 1957. This fact was, however, not proved on the record of the case. It was, however, mentioned in the judgment of the appeal Court. In the petition for Special Leave no reference to this fact was made. Whether the High Court was right in a case of this kind to go by the record, or in view of what the appeal Court below had said, might have called for an affidavit, it is not necessary to decide and I express no opinion about it. It is, however, a very different matter when we come to proceedings in this Court. The tenant was seeking Special Leave against the order of the High Court. At the forefront of his petition, he had mentioned the fact that the High Court having held that there was no proof of the withdrawal of the amount by the tenant or that the petitioner was in arrears, should have exercised the discretion, which the High Court held was possessed by it, in his favour.

The tenant hid the fact that even before the decision in the Court of first instance, he was in arrears as he had withdrawn the amount of Rs. 400. He was thus taking advantage of a fictional deposit in Court which in point of fact was not in existence. Whatever may be said about the ordinary course of litigation in which parties succeed or fail on the sufficiency or otherwise of proof on the record, it appears to me that when a party approaches this Court under Article 136, there must be full candour on his part. The powers exercisable by this Court under Article 136 of the Constitution are not in the nature of a general appeal. They enable this Court to interfere in cases where an irreparable injury has been caused by reason of a miscarriage of justice due to a gross neglect of law or procedure or otherwise and there is no other adequate remedy. The Article is hardly meant to afford relief in a case of this type where a party is in default of rent because he withdrew a deposit lying in Court but who cannot, on the record of the case, be shown to have withdrawn the amount. If the petition had mentioned that the decision of the appeal Court had proceeded on the ground that the amount was taken out, it is difficult to imagine that this Court would have given Special Leave to decide a question of discretion.

I have considered the matter carefully. This is not a case of a mere error in the narration of facts or of a *bona fide* error of judgment which in certain circumstances may be considered to be venial faults. This is a case of being disingenuous with the Court by making out a point of law on a supposititious state of facts, which facts, if told candidly, leave no room for the discussion of the law. The appellant has by dissembling in this Court induced it to grant Special Leave in a case which did not merit it. I agree, therefore, that this leave should be recalled and the appellant, made to pay the costs of this appeal.

V.S.

Leave to appeal revoked.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUTA, JJ.

The Canara Bank, Ltd. and another

.. *Appellants**

v.

T. S. Ramakrishna and others

.. *Respondents.**Industrial Disputes Act (XIV of 1947), section 33-C (2)—Scope.*

The claim under section 33-C (2) of the Industrial Disputes Act postulates that the determination of the question about computing the benefit in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right. For the purpose of making the determination under section 33-C (2), it would, in appropriate cases be open to the Labour Court to interpret the award or settlement on which the workman's right rests.

Appeals by Special Leave from the Orders dated 7th March, 1952 of the Central Government Labour Court at Delhi, in L.C.A. Nos. 211 and 224 and 239 to 241 of 1962 respectively.

N. V. Phadke, Advocate and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of *M/s. J.B. Dadachanji & Co.*, for Appellants (In all the Appeals).

A. V. Viswanatha Sastri, Senior Advocate (*M. K. Ramamurthi, R. K. Garg, D. P. Singh and S. C. Agarwal*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Respondents (In all the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, J.—Civil Appeals Nos. 827 and 828 of 1962 arise out of applications made by the respondents against the appellant the Canara Bank, Ltd., and C.A. Nos. 829-831 of 1962 arise from similar applications made by the respondents against their employer-appellant the Canara Industrial and Banking Syndicate Ltd., under section 33-C (2) of the Industrial Disputes Act, 1947 (XIV of 1947). The points arising in these appeals are exactly the same as those which have been considered by us in Civil Appeals Nos. 823-826 of 1962. In fact, the applications from which these two groups of appeals arise were considered by the same Labour Court along with the applications from which C.A. Nos. 823-826 of 1962 arose, and so, for the reasons which we have indicated in the said appeals, we set aside the orders passed by the Labour Court and send back these matters for disposal in accordance with law in the light of the judgment which we have delivered in Civil Appeals Nos. 823 to 826 of 1962.¹ There would be no order as to costs.

K.S.

Appeal allowed.

* C.A. Nos. 827 to 831 of 1962.

19th April, 1963.

1. Since repotted *Central Bank of India v. P.S. Rajagopalan*, (1964) 2S.C.J. 176.

THE SUPREME COURT OF INDIA.
(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

The Management of Express Newspapers, Ltd.

.. Appellant*

v.

B. Somayajulu and others

.. Respondents.

Working Journalists Industrial Disputes Act (I of 1955), section 2 (b) and Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (XLV of 1955), section 2 (f)—“Working Journalists”—*Part-time workers like correspondents if outside the scope of definition.*

Whenever an employee working in the newspaper establishment claims the status of a working journalist he has to establish first that he is a journalist, and then that journalism is his principal avocation and he has been employed as such journalist. Part-time employees are not necessarily excluded from the definition in section 2 (b) of Act I of 1955.

The word “avocation” used in the definition of working journalist cannot possibly mean a distraction or diversion from one’s regular employment. On the contrary, it plainly means one’s vocation, calling or profession. The plain idea underlying section 2 (b) of Act I of 1955 is that if a person is doing the work, say of a correspondent, and at the same time is pursuing some other calling or profession, say that of a lawyer, it is only where his calling as a journalist can be said to be his principal calling that the status of a working journalist can be assigned to him. It would be on the whole inappropriate to adopt the dictionary or the etymological meaning of the word “avocation” in construing section 2 (b). Therefore, when a question arises as to whether a journalist can be said to be a working journalist, it has to be shown that journalism of whatever kind contemplated by section 2 (b) is the principal avocation of the person claiming the status of a working journalist and that naturally would involve an enquiry as to the gains made by him by the pursuit of other callings or professions. This test will be merely academic and of no significance in the case of full-time journalists. This test assumes significance and importance only in the case of journalists who are employed on part-time basis.

Appeal from the Judgment and Order dated 10th March, 1961 of the Andhra Pradesh High Court in Writ Petition No. 677 of 1958.†

A. V. Viswanatha Sastri, Senior Advocate (Jayaram and R. Ganpathi Iyer, Advocates, with him), for Appellant.

V. K. Krishna Menon, Senior Advocate (M. K. Ramamurthi, R. K. Garg, S. C. Agarwala and D. P. Singh, Advocates of M/s. Ramamurthi & Co., with him), for Respondent No. 1.

K. R. Chaudhuri and P. D. Menon, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The principal question which arises in this appeal is whether the respondent B. Somayajulu is a working journalist under section 2 (b) of the Working Journalists Industrial Disputes Act, 1955 (I of 1955) (hereinafter called ‘the Act’). That question arises in this way. On the 19th February, 1955, the respondent was appointed a Correspondent at Guntur by the appellant, the management of the Express Newspapers, Ltd. He did that work continuously until the 20th October, 1955, on which date his services were terminated. The Andhra Union of Working Journalists, Elluru, then took up the respondent’s cause and alleged that his services had been terminated by the appellant without any justification and that as a working journalist, he was entitled to reinstatement and compensation for the period during which he was not allowed to work by the appellant in consequence of the order passed by the appellant terminating his services. This dispute was referred by the Government of Andhra Pradesh for adjudication to the Labour Court, Guntur. The question referred for adjudication was whether the termination of services of Mr. B. Somayajulu, Correspondent of Indian Express Newspapers at Guntur was justified? If not, to what relief was he entitled? Before the Labour Court, the respondent claimed that in addition to reinstatement, compensation should be awarded to him from 13th October, 1955 to 1st May, 1956 at Rs. 75 per mensem and thereafter upto the date of

* C.A. No. 202 of 1963.

18th April, 1963.

† (1961) 2 An.W.R. 133.

reinstatement at the rate prescribed by the Wage Board for Working Journalists under the provisions of the Act.

The appellant disputed this claim on several grounds. It urged that the Labour Court had no jurisdiction to entertain the Reference, because the appointment of the respondent had been made at Madras, the money due to him was sent from Madras, and so, the appropriate Government which could have made the Reference was the Madras Government and not the Government of Andhra Pradesh. This argument has been rejected by the Labour Court. It was also urged that the Reference was invalid since the order of Reference in terms did not refer to section 10 (1) (c) of the Industrial Disputes Act under which the power to refer had been exercised. The Labour Court repelled this contention as well. Then it was alleged that the dispute referred to the Labour Court for its adjudication was an individual dispute and had not been properly sponsored by any Union. The Labour Court was not impressed even by this plea. That is how the preliminary objections raised by the appellant were all rejected.

On the merits, the appellant urged that the respondent was not a Working Journalist under section 2 (b) of the Act. In support of this plea the appellant averred that the respondent was a part-time correspondent unattached to any particular newspaper establishment, that a year or so later he was appointed as a selling agent of the publications of the appellant, such as the *Express Newspapers*, *Dinamani* and *Andhra Prabha* at Guntur which assignment was given to him on his depositing Rs. 6,000 which was later raised to Rs. 7,000. According to the appellant, as such selling agent, the respondent was making on an average about Rs. 1,500 per mensem as commission, whereas, as a correspondent he was first paid on lineage basis and later an honorarium was fixed at Rs. 50 which was subsequently raised to Rs. 75 per mensem. This latter amount was paid to him until his services were terminated. The appellant, therefore, contended that the avocation of a moffusil correspondent was not the respondent's principal avocation, and so, he could not claim the benefit of the status of a Working Journalist under section 2 (b) of the Act.

The Labour Court took the view that part-time workers were outside the purview of the Act. It also referred incidentally to the commission which the respondent received as a selling agent and made some observations to the effect that the payment to the respondent for his work as a correspondent was very much less than the commission which he received from the appellant as its selling agent. It is common ground that some time before the respondent's services as a correspondent were terminated, his selling agency had also come to an end. From the award made by the Labour Court, it is clear that the Labour Court decided the matter against the respondent solely on the ground that as a part-time worker he could not be regarded as a Working Journalist, and it made no finding on the question as to whether his principal avocation at the time when his services were terminated could be said to satisfy the test prescribed by the definition under section 2 (b).

The award made by the Labour Court was challenged by the respondent before the Andhra Pradesh High Court by a Writ Petition under Articles 226 and 227 of the Constitution. The High Court has held¹ that the respondent is a Working Journalist under section 2 (b) and so, it has set aside the award passed by the Labour Court. There is no specific direction issued by the High Court remanding the proceedings between the parties to the Labour Court for disposal on the merits in accordance with law, but that clearly is the effect of the order. It is against this decision that the appellant has come to this Court with a certificate issued by the said High Court; and on behalf of the appellant, the principal contention raised by Mr. Sastri is that the High Court was in error in holding that the respondent was a Working Journalist under section 2 (b).

The Act which applied to the proceedings between the parties was the Act I of 1955. This Act came into force on the 12th March, 1955. It consists

of only 3 sections: Section 1 gave the title of the Act; section 2 defined 'newspaper' and 'Working Journalist' by clauses (a) and (b); and section 3 made a general provision that the provisions of the Industrial Disputes Act, 1947, applied to, or in relation to, Working Journalists as they applied to, or in relation to, workmen within the meaning of that Act. In other words, the scheme of the Act was to define 'newspaper' and 'Working Journalist' and to make the provisions of the Industrial Disputes Act applicable to Working Journalists.

This Act was followed by the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (XLV of 1955). This Act consists of 21 sections and makes some specific provisions applicable to Working Journalists, different from the relevant provisions of the Industrial Disputes Act. Section 2 (f) of this Act defines a Working Journalist. The definition prescribed by section 2 (f) of this Act is identical with the definition prescribed by section 2 (b) of the earlier Act, and so, for the purpose of the present appeal, whatever we say about the scope and effect of the definition of section 2 (b) in the earlier Act will apply to the definition prescribed by section 2 (f) of the latter Act. Section 3 of this latter Act makes the provisions of the Industrial Disputes Act, 1947, applicable to Working Journalists. Sections 4 and 5 make special provisions in respect of retrenchment and gratuity. Section 6 prescribes the hours of work; section 7 deals with the problem of leave; section 8 provides for the constitution of a Wage Board; section 9 deals with the fixation of wages; section 10 requires the publication of the decision of the Board and its commencement, while section 11 deals with the powers and procedure of the Board. Section 12 makes the decision of the Board binding and section 13 gives power to the Government to fix interim rates of wages. These provisions are contained in Chapter II. Chapter III consists of 2 sections 14 and 15 and they make applicable to the newspaper employees the provisions of the Industrial Employment (Standing Orders) Act, 1946 and the Employees' Provident Funds Act, 1952. Chapter IV contains miscellaneous provisions, such as those relating to the recovery of money due from an employer under section 17, penalty under section 18 and indemnity under section 19. Section 20 confers the rule-making power on the Central Government, and section 21 repeals the earlier Act.

In dealing with the question as to whether the respondent can be said to be a Working Journalist, it is necessary to read the definition prescribed by section 2 (b) of the Act:

"'Working Journalist' means a person whose principal avocation is that of a journalist and who is employed as such in, or in relation to, any establishment for the production or publication of a newspaper or in, or in relation to, any news agency or syndicate supplying material for publication in any newspaper, and includes an editor, a leader-writer, news-editor, sub-editor, feature-writer, copy-tester, reporter, correspondent, cartoonist, news-photographer and proof-reader, but does not include any such person who—

(i) is employed mainly in a managerial or administrative capacity, or

(ii) being employed in a supervisory capacity, exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

It is plain that the definition prescribed by section 2 (b) consists of two parts; the first part provides what a Working Journalist means, and the second part brings within its purview by an artificial extension certain specified categories of newspaper employees. It would be noticed that the first part provides for two conditions which must be satisfied by a journalist before he can be held to be a Working Journalist. The first condition is that he must be a journalist whose principal avocation is that of a journalist, and the second condition is that he must be employed as such in, or in relation to, any establishment as there specified. The first question which arises for our decision is whether the two conditions thus prescribed by the first part of the definition govern the categories of newspaper employees included in the definition by the artificial extension made by the including clause. The High Court has taken the view that the categories of employees who are included in the definition by name, need not satisfy the two conditions prescribed by the first part. The argument is that since a correspondent, for instance, has been

named in the second clause, the whole object of the Legislature was to make him a Working Journalist without requiring him to satisfy the two conditions prescribed by the first part. In our opinion, this construction is plainly erroneous. The object of the second clause was to make it clear that the employees specified in that clause are journalists and nothing more. The word "journalist" has not been defined in the Act and the Legislature seems to have thought that disputes may arise as to whether a particular newspaper employee was a journalist or not. There can, of course, be no difficulty about an editor or a leader-writer, or a news-editor or a sub-editor being regarded as a journalist; but it was apparently apprehended that a difficulty may arise, for instance, in the case of a correspondent, a proof-reader, a cartoonist, a reporter, a copy-tester, or a feature-writer, and so, the Legislature took the precaution of providing specifically that the employees enumerated in the latter clause are to be regarded as journalists for the purpose of the definition prescribed by section 2 (b). The object of the artificial extension made by the including clause is not to dispense with the two main conditions prescribed by the definition before a journalist can be regarded as a Working Journalist. There can be no doubt that even the employees falling under the extended meaning must be employed as such. It is thus obvious that the second requirement prescribed by the first clause that the journalist must be employed as such in, or in relation to, any establishment for the production or publication of a newspaper, as therein specified, has to be satisfied by the employees falling under the latter clause, because unless there was an employment by the newspaper establishment, no relationship of employer and employee can arise, and the journalists specified in the latter clause could not, therefore, claim the status of Working Journalist *qua* the employer who manages the journal in question. Once it is realised that the test of employment must govern the employees specified in the latter clause, it would become clear that the High Court was in error in assuming that the extended artificial definition of the Working Journalist dispensed with both the conditions prescribed by the first part of the said definition. That is why we think the extension was made by the word "includes" only for the purpose of removing any doubt as to whether the persons specified in the said clause are journalists or not. What is true about the condition as to employment is equally true about the other condition that a journalist can be a Working Journalist only where it is shown that journalism is his principal avocation. In other words, the position is that whenever an employee working in the newspaper establishment claims the status of a Working Journalist he has to establish first that he is a journalist, and then that journalism is his principal avocation and he has been employed as such journalist. In proving the fact that he is a journalist, the employees specified in the latter clause need not prove anything more than this that they fall under one or the other category specified in the said clause. But that only proves their status as journalist; they have still further to show that their principal avocation is that of a journalist and that they have been employed as such by the newspaper establishment in question.

That takes us to the question as to what is meant by avocation? The High Court thought that the dictionary meaning of the word "avocation" which showed that it meant "a distraction or diversion from one's regular employment", could be adopted in the context of section 2 (b). In support of this view, the High Court has cited a passage from Fowler in Modern English Usage. Fowler says:

"Avocation originally a calling away, an interruption, a distraction, was for some time commonly used as a synonym for vocation or calling, with which it is properly in antithesis. This misuse is now less common, and the word is generally used in the plural, a person's avocations being the things he devotes time to, his pursuits or engagements in general, the affairs he has to see to; his vocation as such is neither excluded from, nor necessarily included in, his avocation."

Applying this dictionary meaning of the word "avocation," the High Court has held that even if the respondent has to satisfy the first condition prescribed by the first part of section 2 (b), it can be held that he satisfied the said test, because the work of a correspondent in his case can be safely said to be his principal avocation in the sense of distraction or diversion from his regular employment. In our opinion, in applying mechanically the dictionary meaning of the word "avocation"

without due regard to the context of section 2 (b) the High Court has adopted a somewhat pedantic approach. One has merely to read the definition to realise the word "avocation" used in section 2 (b) cannot possibly mean a distraction or diversion from one's regular employment. On the contrary, it plainly means one's vocation, calling or profession. The plain idea underlying section 2 (b) is that if a person is doing the work, say of a correspondent, and at the same time is pursuing some other calling or profession, say that of a lawyer, it is only where his calling as a journalist can be said to be his principal calling that the status of a working journalist can be assigned to him. That being the plain object of section 2 (b), it would, we think, be, on the whole, inappropriate to adopt the dictionary or the etymological meaning of the word "avocation" in construing section 2 (b). We ought to add that Mr. Menon who appeared for the respondent did not attempt to support the approach adopted by the High Court in dealing with this point. Therefore, when a question arises as to whether a journalist can be said to be a working journalist, it has to be shown that journalism of whatever kind contemplated by section 2 (b) is the principal avocation of the person claiming the status of a working journalist and that naturally would involve an enquiry as to the gains made by him by pursuing the career of a journalist as compared with the gains made by him by the pursuit of other callings or professions. It is obvious that this test will be merely academic and of no significance in the case of full time journalists, because in such cases the obvious presumption would be that their full time employment is their principal avocation and no question of comparing their income from journalism with income from other sources can arise. In fact, the status of such full time journalists as working journalists will not be affected even if in some cases the income received by them from such employment may be found to be less than, say, for instance, the income from their ancestral property. This test assumes significance and importance only in the case of journalists who are employed on part-time basis.

Reverting to the second requirement of employment which we have already seen must obviously govern the employees falling under the latter part of section 2 (b) if they seek the status of working journalists, it is plain that an employment must be proved, because that alone will create a relationship of employer and employee between them and the newspaper establishment. Unless there is an employment, there can be no conditions of service and there would be no scope for making any claim under the Act. Thus the requirement of employment postulates conditions of service agreed between the parties subject to which the relationship of master and servant comes into existence. In the context, employment must necessarily postulate exclusive employment, because a working journalist cannot serve two employers, for that would be inconsistent with the benefits which he is entitled to claim from his employer under the Act. Take the benefit of retrenchment compensation, or gratuity, or hours of work, or leave; how is it possible for a journalist to claim these benefits from two or more employers? The whole scheme of the Act by which the provisions of the Industrial Disputes Act have been made applicable to working journalists, necessarily assumes the relationship of employer and employee and that must mean exclusive employment by the employer on terms and conditions of service agreed between the parties. Normally, employment contemplated by section 2 (b) would be full time employment; but part-time employment is not excluded from section 2 (b) either. Most of the employees falling under the first clause of section 2 (b) or even under the artificial extension prescribed by the later clause of section 2 (b) would be full time employees. But it is theoretically possible that a news-photographer, for instance, or a cartoonist may not necessarily be a full time employee. The modern trend of newspaper establishments appears to be to have on their rolls full time employees alone as working journalists; but on a fair construction of section 2 (b), we do not think it would be possible to hold that a part-time employee who satisfies the test prescribed by section 2 (b) can be excluded from its purview merely because his employment is part-time.

The position, therefore, is that the Labour Court was in error in making a finding that the respondent was not a working journalist on the ground that he was a part-time employee, whereas the High Court is in error in holding that the

respondent is an employee because he has not to satisfy the test that journalism is his principal avocation. As we have held, the respondent can be said to be a working journalist only if he satisfies the two tests prescribed by the first part of section 2 (b). The test that he should have been employed as a journalist would undoubtedly be satisfied because it is common ground that since 1935 he has been working as a correspondent of the appellant at Guntur and the payment which the appellant made to him by whatever name it was called was also regulated by an agreement between the parties; in its pleadings, the appellant has, however, disputed the fact that the respondent was exclusively employed by it and so, that is one question which still remains to be tried. The further question which has to be considered is whether the respondent satisfies the other test: "was his working as a correspondent his principal avocation at the relevant time"? The definition requires that the respondent must show that he was a working journalist at the time when his services were terminated; and that can be decided only on the evidence adduced by the parties. Unfortunately, though the Labour Court has made certain observations on this point, it has not considered all the evidence and has made no definite finding in that behalf. That was because it held that as a part-time employee, the respondent was outside section 2 (b). The High Court has no doubt purported to make a finding even on this ground in the alternative, but, in our opinion, the High Court should not have adopted this course in dealing with a writ petition under Articles 226 and 227. Even in dealing with this question, the High Court appears to have been impressed by the fact that in discharging his work as a correspondent the respondent must have devoted a large part of his time; and it took the view that the test that journalism should be the principal avocation of the journalist implied a test as to how much time is spent in doing the work in question? The time spent by a journalist in discharging his duties as such may no doubt be relevant, but it cannot be decisive. What would be relevant, material and decisive is the gain made by the part-time journalist by pursuing the profession of journalism as compared to the gain made by him by pursuing other vocations or professions. In dealing with this aspect of the matter, it may no doubt be relevant to bear in mind the fact that some months before his services as a correspondent were terminated the respondent's selling agency had come to an end, and so, the Labour Court may have to hold an enquiry into the question as to whether the respondent proves that the work of correspondent was his principal avocation at the relevant time in the light of the relevant facts. The onus to prove this issue as well as the issue as to whether he was in the exclusive employment of the appellant lies on the respondent, because his claim that he is a working journalist on these grounds is disputed by the appellant, and it is only if he establishes the fact that he is a working journalist that the question as to determining the relief to which he is entitled may arise. We, therefore, allow the appeal, set aside the order passed by the High Court and remand the case to the Labour Court with a direction that it should deal with the dispute between the parties in accordance with law in the light of this judgment. There would be no order as to costs.

Before we part with this appeal, however, we would incidentally like to refer to the fact that the test of the principal avocation prescribed by section 2 (b) has presumably been adopted by the Legislature from the recommendations made by the Press Commission in its report. In paragraph 505, dealing with the question of working journalists, the Commission observed that it thought that

"only those whose professed avocation and the principal means of livelihood is journalism should be regarded as working journalists,"

and it added that:

"we have deliberately included the words 'professed avocation' because we have come across cases where persons belonging to some other professions, such as law, medicine, education, have devoted part of their time to the supply of news to, and writing articles for, newspapers. It may be that in the case of some of them, particularly during the earlier years of their professional career, income from the practice of their own profession was less than the income from contributions to newspapers. But it would not, on that account, be correct to classify them as working journalists so long as their professed avocation is other than journalism."

It would be noticed that the expression "professed avocation" has not been adopted by the Legislature; instead, it has used the words "principal avocation". That is why we are inclined to take the view that the time taken by a person in pursuing two different professions may not be decisive; what would be decisive is the income derived by him from the different professions respectively. It does appear that the Legislature was inclined to take the view that if a person following the profession of law in the early years of his career received more money from journalistic work and satisfied the other tests prescribed by section 2 (b) he may not be excluded from the definition merely because he is following another profession. To that extent, the provision of section 2 (b) departs from a part of the recommendation made by the Press Commission.

In regard to part-time employees who, as we have held, are not necessarily excluded from section 2 (b), the position appears to be that the report by the Wage Committee appointed by the Union Government under the provisions of Act XLV of 1955, shows that the Committee treated some part-time employees as working journalists. In paragraph 103, the Committee has observed that it had provided a regular scale or retainer for part-time correspondents, and it has added that the remuneration in accordance with that scale will be available to the part-time correspondents only if, in accordance with the definition in paragraph 23, Part II, of its recommendations, their principal avocation is journalism. The Committee noticed the fact that many of the part-time correspondents employed by newspaper establishments would not fall within the definition if their principal avocation is something else and journalism is only a side business, and it added that the problem of the said class of part-time correspondents was not within the purview of its terms of reference, and so, it made no recommendations in regard to that class.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

M/s. K. S. Rashid and Son and others

.. *Appellants**

v.

Income-tax Officer

.. *Respondent.*

Income-tax Act (XI of 1922), sections 34 (1) (a) and 34 (1-A)—Back assessment—Escaped income of war period, 1st September, 1939 to 31st March, 1946—Applicability to escapement of a lakh of rupees or more—Removal of time-limit of eight years—Special provisions, whether discriminatory—Whether provide for appeals, revision etc.—Constitution of India (1950), Article 14.

Proceedings were taken against the assessee under section 34 (1-A) of the Indian Income-tax Act, 1922, for re-assessment of its escaped income for the years 1941-42 to 1946-47. The assessee challenged the re-assessment proceedings on the ground that section 34 (1-A), when compared with section 34 (1) (a), was violative of Article 14 of the Constitution. The assessee contended that even though the subject-matter of assessment might be the same under both the provisions, section 34 (1) (a) authorized back assessment of escaped income of any amount, though only within 8 years, whereas section 34 (1-A) authorized such an assessment at any time, even beyond 8 years, but only in respect of escaped income of a lakh of rupees or more. As a matter of construction of section 34 (1-A), it was further contended that rights of appeal, references and the like would not be available against a back assessment made under that provision.

Held, that section 34 (1-A) is valid and has not contravened Article 14 of the Constitution.

There is a rational classification between assessee falling under section 34 (1) and those falling under section 34 (1-A). It is true that in a broad sense both sections 34 (1) (a) and 34 (1-A) deal with cases of income which has escaped assessment. But the similarity between the two categories disappears when we remember that section 34 (1-A) is intended to deal with assessee whose income has escaped assessment during the specified period between September 1, 1939 and March 31, 1946. It is well known that that was the period in which as a result of the War, huge profits were made in business and industry.

Action under section 34 (1-A) could be taken only where income which has escaped assessment is likely to amount to Rs. 1 lakh or more. But, the object of the Legislature being to catch income which

had escaped assessment, it would be legitimate for the Legislature to deal with the class of assessee in whose cases the income which had escaped assessment was much larger, because that would be a basis for rational classification which has an intelligible connection with the object intended to be achieved by the statute.

The challenge made to the validity of section 34 (1-A) on the ground that the remedy by way of appeals or revisions which is available to the assessee against whom proceedings are taken under section 34 (1) is not available to assessee who are covered under section 34 (1) cannot be sustained. The assessment or re-assessment which has to follow the issue of a notice under section 34 (1-A) must be assessment or re-assessment in accordance with the relevant provisions of the Act. It could not have been the intention of the Legislature when it enacted section 34 (1-A) that the procedure prescribed by the relevant provisions of the Act beginning with section 22 should not be applicable to proceedings taken under section 34 (1-A).

Appeals from the Judgment and Decree dated 13th and 11th August, 1959 of the Allahabad High Court in Civil Misc. Writ Petitions Nos. 870 to 873 and 349 of 1956 respectively, and petitions under Article 32 of the Constitution of India for enforcement of fundamental rights.

G. S. Pathak, Senior Advocate (S. N. Andley, Rameshwar Nath and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., with him), for the Appellants in C. As. Nos. 37 to 40 of 1963 and the Petitioners (In all the Petitions).

M. C. Setalvad, Senior Advocate (Rameshwar Nath, S. N. Andley and P. L. Vohra, Advocates of M/s. Rajinder Narain & Co., with him), for the Appellant in C.A. No. 589 of 1963.

C. K. Daphtry, Attorney-General for India and K. N. Rajagopal Sastri, Senior Advocate (R. N. Sachithy, Advocate, with them), for the Respondents in all the Appeals and Petitions.

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—These Civil Appeals and Writ Petitions have been placed before us for hearing in a group, because all of them raise a common question of law about the validity of section 34 (1-A) of the Indian Income-tax Act (XI of 1922) (hereinafter called 'the Act').

M/s. K. S. Rashid and Son, and its partner, Rashid Ahmad, are the appellants in Civil Appeals Nos. 37 to 40 of 1963, and petitioners in W. Ps. Nos. 335 to 345 of 1960. The appeals arise out of the four Writ Petitions (Nos. 870-873 of 1956) filed by the firm and its partner in the High Court of Allahabad challenging the validity of the notices served upon them under section 34 (1-A) of the Act in respect of their income for the years 1941-42 to 1946-47. These Writ Petitions have been dismissed by the said High Court, and it is with the certificate issued by it that the firm and its partner have come to this Court in appeal. The Writ Petitions Nos. 335—345 of 1960 have been filed by the same parties in this Court under Article 32 of the Constitution in respect of the notices served on them on the 19th March, 1956, and the order of excess profits tax levied on them. In those petitions, the same point is urged by the parties; and that is that the notices are invalid, because section 34 (1-A) is itself *ultra vires*. The respondents to the appeals are: the Commissioner of Income-tax, U. P., Lucknow, and the Income-tax Officer, Central Circle IV, Delhi. The respondents to the writ petitions are: the Income-tax Officer, Central Circle IV, New Delhi, the Income-tax Officer, 'A' Ward, Meerut, the Commissioner of Income-tax, U.P., Lucknow, and the Central Board of Revenue, New Delhi.

Civil Appeal No. 589 of 1963 has been brought to this Court in similar circumstances by the appellant, M/s. Bhawani Prasad Girdharlal. The appellant had challenged the validity of the notices issued against it on the 16th August, 1955, under section 34 (1-A) of the Act. The Writ Petition filed by the appellant has been dismissed by the Allahabad High Court and it is with the certificate issued by the said High Court that the present appeal has been brought to this Court. That is how the only question which arises for our decision in this group of matters relates to the validity of section 34 (1-A) of the Act.

The argument urged in support of the challenge to the validity of the impugned section is that it suffers from the vice of contravening Article 14 of the Constitu-

tion. It is urged that whereas under section 34 (1) which deals with similar cases of assessee, the remedy by way of appeals and revisions under the relevant provisions of the Act is available to the assessee, that remedy is denied to the assessee against whom proceedings are taken under the impugned section. Section 34 (1) thus gives a preferential treatment to the assessee who are similarly placed with the assessee dealt with under section 34 (1-A); and that amounts to unconstitutional discrimination. It is also urged that in regard to cases falling under section 34 (1) (a) as it stood at the relevant time, a period of limitation of 8 years had been prescribed beyond which the assessing authority could not act, and this protection of the prescribed period of limitation is not available to the assessee against whom action is taken under the impugned section. It is on these two grounds that the validity of section 34 (1-A) is challenged before us.

Section 34 deals with income, which has escaped assessment. Section 34 (1) (a) deals with cases where income has, *inter alia*, escaped assessment, owing to the omission or failure on the part of the assessee to make a return of his income under section 22 for any year, or to disclose fully and truly all material facts necessary for his assessment for that year, whereas section 34 (1) (b) refers to cases where income has escaped assessment notwithstanding that there has been an omission or failure as mentioned in clause (a) on the part of the assessee. In respect of the first category of cases, section 34 (1) had provided at the relevant time that the Income-tax Officer may, in cases falling under clause (a) at any time within eight years, and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee

"a notice containing all or any of the requirements which may be included in the notice under sub-section (2) of section 22, and may proceed to assess such income, profits or gains, recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

Let us now read the relevant portion of section 34 (1-A). This provision lays down, *inter alia*, that if, in any case of an assessee, the Income-tax Officer has reason to believe :

(i) that income has escaped assessment for any year in respect of which the relevant previous year falls wholly or partly within the period beginning on the 1st day of September, 1939, and ending on the 31st day of March, 1946; and

(ii) that the said income amounts, or is likely to amount, to Rs. 1 lakh or more, he may notwithstanding that the period of eight years or, as the case may be, four years specified in sub-section (1) has expired, in respect thereof, serve on the assessee, or, if the assessee is a company or the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess the income, profits or gains of the assessee for all or any of the years referred to in clause (1), and thereupon the provisions of this Act (excepting those contained in clauses (i) and (ii) of the proviso to sub-section (1) and in sub-sections (2) and (3) of this section) shall, so far as may be, apply accordingly :

Provided that the Income-tax Officer shall not issue a notice under this sub-section unless he has recorded his reasons for doing so, and the Central Board of Revenue is satisfied on such reasons recorded that it is a fit case for the issue of such notice.

Provided further that no such notice shall be issued after the 31st day of March, 1956.

It is urged that whereas in cases falling under section 34 (1), the Income-tax Officer has to deal with the matter on the footing that the notice issued against the assessee is a notice under section 22 (2), that obligation is not imposed on the Income-tax Officer while he deals with cases falling under section 34 (1-A) because the words "as if the notice were a notice issued under that sub-section" which are found in section 34 (1) are omitted in section 34 (1-A). It is not seriously disputed that if the notice issued under section 34 (1-A) is not deemed to be notice under section 22 (2), the remedies by way of appeals and revisions which are prescribed by sections 30, 31, 32, 33, 33-A and 33-B of the Act would not be available to the assessee, and so, the main basis for the attack against the validity of section 34 (1-A) rests on the hypothesis that the omission of the relevant words in section 34 (1-A) in substance deprives the assessee of the said remedies prescribed by the relevant provisions of the Act. If the assumption on which this challenge proceeds is well-founded, section 34 (1-A)

may suffer from the infirmity that it contravenes Article 14. Though, as we will later point out, there is a rational classification between the assessee falling under section 34 (1), and those falling under section 34 (1-A), that rational classification would not justify the denial of the right of appeal to the persons included in section 34 (1-A). The question thus presented is one of construction.

Before dealing with the construction of section 34 (1-A), it would be necessary to refer very briefly to the background of the enactment of the said section. This section was introduced by an amendment in the Act on the 17th July, 1954, and that was because section 5 (4) of the Taxation on Income (Investigation Commission) Act (L of 1947) was struck down by this Court as unconstitutional on May 28, 1954, in *Suraj Mall Mohta and another v. A. V. Viswanatha Sastri and another*¹. In that case, while examining the validity of section 5 (4) of the Investigation Commission Act, this Court held that the persons brought within the mischief of the said section belong to the same class of persons who fall within the ambit of section 34 of the Act and are dealt with by section 34 (1), and in view of the fact that the procedure prescribed by section 5 (4) of the Investigation Commission Act was very much less favourable to the assessee than the one available to them if action was taken against them under section 34 (1), the conclusion reached was that the impugned section 5 (4) was unconstitutional. It is unnecessary to refer to the several grounds mentioned by Mahajan, C.J., who spoke for the Court in striking down the impugned section.

After this judgment was pronounced, the Legislature intervened and enacted section 34 (1-A). That, however, was not the end of the matter. When section 34 (1-A) was introduced in the Act, there remained two statutory provisions dealing with substantially the same subject-matter, section 5 (i) of the Investigation Commission Act, and section 34 (1) of the Act. In *Shree Meenakshi Mills Ltd., Madurai v. Sri A. V. Viswanatha Sastri and another*², a point was raised before this Court as to whether it was open to the Income-tax Department to invoke section 5 (1) of the Investigation Commission Act after section 34 (1-A) of the Act was enacted, and this Court held that it was not, because on comparing the two relevant provisions, section 5 (1), according to the decision of this Court, contravened Article 14 of the Constitution. That is how, section 5 (1) became a dead letter and the Investigation Commission, in consequence, ceased to function. The cases which had been referred to that Commission and which had not been completed had, therefore, to be taken up under section 34 (1-A) of the Act. Thus, it would be noticed that the present controversy has had a somewhat chequered career. The first challenge was to section 5 (4) of the Investigation Commission Act; when the challenge succeeded and the said section was struck down in the case of *Suraj Mall Mohta*¹, the Legislature intervened and section 34 (1-A) was added in the Act. Nevertheless, the cases pending before the Investigation Commission were sought to be continued before the said Commission under section 5 (1) and this section was struck down in the case of *Shree Meenakshi Mills Ltd.*²; and, now that proceedings against the same class of assessee are sought to be continued under section 34 (1-A), it is urged that section 34 (1-A) of the Act itself is invalid. It is in the light of this background that the controversy between the parties in the present proceedings has to be judged.

Reverting then to the question of construction, the narrow point which needs to be examined is, what is the effect of the omission to include in section 34 (1-A) the clause "as if the notice were a notice issued under that sub-section" which is to be found in section 34 (1)? In dealing with this question, we think it would not be unreasonable to bear in mind that when the Legislature enacted section 34 (1-A), it must have desired to remove the infirmities which had rendered section 5 (4) of the Investigation Commission Act invalid. In other words, the Legislature must have presumably wanted to afford to the assessee in respect of whom section 34 (1-A) was intended to be invoked, the same remedies that were available to the assessee covered by section 34 (1). Though the importance or significance of this considera-

1. (1954) S.C.J. 611 : (1955) 1 S.C.R. 448.

2. (1955) S.C.J. 62 : (1955) 1 M.L.J. (S.C.) 21: (1955) 1 S.C.R. 787.

tion cannot be unduly emphasised, it cannot be said that this consideration is altogether irrelevant.

We have already read the relevant portion of section 34 (1-A) and we have seen that it requires that a notice containing all or any of the requirements which may be included in the notice under section 22, sub-section (2) has to be issued. In other words, the notice which is required to be issued is, in terms, in a sense referable to section 22 (2), because the Legislature has provided that it must contain all or any of the requirements which would be included in such a notice. Then, section 34 (1-A) provides that after issuing the notice on the assessee in the manner prescribed by it, the Income-tax Officer may proceed to assess or re-assess the income, profits or gains of the assessee for the relevant years. In the context, it would, we think, be reasonable to hold that the assessment or re-assessment which has to follow the issue of the notice, must be assessment or re-assessment in accordance with the relevant provision of the Act; and this is made very clear by the clause that follows, because the said clause begins with the word "thereupon" which indicates that when the process of assessment or re-assessment commences, the clause beginning with the word "thereupon" comes into operation and this clause requires that the provision of the Act shall, so far as may be, apply accordingly. The word "accordingly" like the word "thereupon" seems to emphasise the applicability of the relevant provisions of the Act to the proceedings taken under section 34 (1-A); otherwise, there is no particular reason which would have justified the further provision in the section excepting certain provisions of the Act which are held to be inapplicable to the proceedings under section 34 (1-A).

It is true that section 34 (1) uses the clause "as if the notice were a notice issued under that sub-section" and section 34 (1-A) does not; but the two provisions were not inserted in the Act at the same time; section 34 (1) in the present form was enacted in 1948, whereas section 34 (1-A) was enacted in 1954. It is quite likely that the draftsman who drafted section 34 (1-A) took the view that the last clause in question which occurred in section 34 (1) was really superfluous and that may account for its omission in section 34 (1-A). In our opinion, therefore, construing the relevant words in section 34 (1-A), it would be difficult to accede to the argument that the said omission was deliberate and significant, and its consequence is that the provisions of section 22 and all other provisions consequent upon the application of section 22 become irrelevant in dealing with cases under section 34 (1-A).

If section 22 is held to be inapplicable to proceedings under section 34 (1-A), the consequence would be entirely irrational and fantastic. The powers conferred on the Income-tax Officer under section 22 (2) to take evidence would then not be available to him, and, indeed, all the powers prescribed and the procedure laid down by section 23 would become irrelevant. Likewise, the provisions in regard to appeals and revisions contained in sections 30, 31, 33, 33-A and 33-B would also be inapplicable. As we have already seen, the inapplicability of these provisions is the main foundation of the attack against the validity of section 34 (1-A). It is, however, urged that though the specific powers conferred by section 23 may not be available to the Income-tax Officer, he may, nevertheless, exercise similar powers, because the authority to assess must itself include such powers as incidental to assessment. The best judgment assessment which is authorised by section 23 (4) may, it is suggested, be made even in cases falling under section 34 (1-A) under the inherent authority of the Income-tax Officer. In our opinion, this approach is wholly misconceived. We are satisfied that it could not have been the intention of the Legislature when it enacted section 34 (1-A) that the procedure prescribed by the relevant provisions of the Act beginning with section 22 should not be applicable to proceedings taken under section 34 (1-A), and that the procedure to be followed in the said proceedings and the powers to be exercised by the Income-tax Officers dealing with them should be what is vaguely described as 'the inherent or incidental powers' of such Officers. Therefore, we have no hesitation in holding that the challenge made to the validity of section 34 (1-A) on the ground that the remedy by way of appeals or revisions which is available to the assessee against whom proceedings are taken

under section 34 (1) is not available to the assessee who are covered by section 34 (1-A), cannot be sustained.

The other contention raised against the validity of section 34 (1-A) is based on the fact that at the relevant time, section 34 (1) (a) dealt with cases similar to those falling under section 34 (1-A), and yet, whereas in the former category of cases a period of limitation was prescribed as 8 years there is no such limitation in regard to the latter, and that, it is urged, means unconstitutional discrimination. We are not impressed by this argument. It is true that in a broad sense both section 34 (1) (a) and section 34 (1-A) deal with cases of income which has escaped assessment, and in that sense, the assessee against whom steps are taken in respect of their income which has escaped assessment can be said to form a similar class; but the similarity between the two categories disappears when we remember that section 34 (1-A) is intended to deal with assessee whose income has escaped assessment during a specified period between September 1, 1939 and March 31, 1946. It is well known that that is the period in which as a result of the War, huge profits were made in business and industry.

The second point which is very important is that in regard to the cases falling under section 34 (1-A), action can be taken only where the income which has escaped assessment is likely to amount to Rs. 1 lakh or more. In other words, it is only in regard to cases where the escaped income is of a high magnitude that the restriction of the period of limitation has been removed. It is difficult to accept the argument that the Legislature was not justified in treating this smaller class of assessee differently on the ground that the profits made by this class were higher and the income which had escaped assessment was correspondingly of a much larger magnitude. The object of the Legislature being to catch income which had escaped assessment, it would be legitimate for the Legislature to deal with the class of assessee in whose cases the income which had escaped assessment was much larger, because that would be a basis for rational classification which has an intelligible connection with the object intended to be achieved by the statute.

It was suggested that as a result of the provisions contained in section 34 (1) (a) and section 34 (1-A) one year would overlap; and that may be true. But the argument of overlapping has no significance because it makes no difference whether action is taken under section 34 (1), or section 34 (1-A) in respect of that year. Once the notice is served under section 34 (1) or section 34 (1-A), the rest of the procedure is just the same and all the remedies available to the assessee are also just the same. Therefore, we see no substance in the argument that the absence of the restriction as to period of limitation under section 34 (1-A) introduces any infirmity in the said provision.

In the result, we must hold that section 34 (1-A) is valid and has not contravened Article 14 of the Constitution. That is the effect of the majority view taken by the Allahabad High Court in *Jai Kishan Srivastava v. Income-tax Officer, Kanpur and another*¹.

There is one minor additional point which has been argued before us by Mr. Setalvad in Civil Appeal No. 589 of 1963, and that point is based upon the requirement prescribed by the Proviso to section 34 (1-A) that the Income-tax Officer shall not issue a notice unless he has recorded his reasons for doing so, and the Central Board of Revenue is satisfied on such reasons recorded that it is a fit case for the issue of such notice. The argument is that the requirement prescribed by the Proviso constitutes a condition precedent for the exercise of the authority conferred on the Income-tax Officer by section 34 (1-A) and since that requirement is not shown to have been satisfied in his case, the appellant in C.A. No. 589 of 1963 must succeed even if section 34 (1-A) is held to be valid. We are not impressed by this argument. What was urged before the High Court by the appellant was not that no reasons had been recorded by the Income-tax Officer as required by the Proviso; the argument was that the appellant had not been given a copy of the said

reasons, and it appears to have been urged that the appellant was entitled to have such a copy. This latter part of the case has not been pressed before us by Mr. Setalvad, and rightly. Now, when we look at the pleadings of the parties, it is clear that it was assumed by the appellant that reasons had been recorded and, in fact, it was positively affirmed by the respondent that they had been so recorded; the controversy being, if the reasons are recorded, is the assessee entitled to have a copy of those reasons? Therefore, we do not see how Mr. Setalvad can suggest that no reasons had in fact been recorded, and so, the condition precedent prescribed by the Proviso had not been complied with.

The result is, all the Civil Appeals and Writ Petitions in this group fail and are dismissed. There would be no order as to costs.

V.S.

Appeals and petitions dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR AND K. N. WANCHOO, JJ.

The State of Maharashtra

.. Appellant*

v.

Jagatsing Charansing Arora and another

.. Respondents.

Penal Code (XLV of 1860), section 161—Gist of offence—Charge and evidence when should indicate the other public servant with whom the service would be rendered—Section 21—“Public servant”—Scope—Road Transport Act (LXIV of 1950), section 43—Protection to public servants—Limits.

Where a person is a public servant in the very office where the appointment is to be made and takes money in order to get the appointment made there is no further question of the charge or evidence indicating who was the other public servant with whom the service would be rendered. It was enough if it was shown that money was paid to a public servant in a particular department by which an order would be made and if it was taken for doing any official act in that department. *State of Ajmere v. Shijilal*, (1959) S.C.J. 911 : (1959) M.L.J. (Crl.) 589 : (1959) Supp. 2 S.C.R. 739, distinguished.

When the accused a public servant in the office of the State Transport Corporation took money from a person seeking employment in the Corporation, he could not be said to be acting or purporting to act in pursuance of any of the provisions of the Road Transport Corporation Act or of any other law (section 43 of the Act) in order that he may be a public servant within the meaning of section 21 of the Penal Code as it stood before its amendment by Act II of 1958.

[The addition of clause (12) to section 21 of the Penal Code by Act (II of 1958) makes such a person a public servant.]

Appeal by Special Leave from the Judgment and Order dated 17th May, 1960, of the Bombay High Court in Criminal Appeal No. 2 of 1959.

H. R. Khanna and R. H. Dhebar, Advocates, for Appellant.

T. V. R. Tatachari, Advocate (*amicus curiae*), for Respondent No. 1.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the Bombay High Court by which the two respondents were acquitted. The prosecution case briefly was that one Dongarsing, a discharged truck driver from the army, was in need of employment. Towards the end of October, 1955 he made an application to the District Soldiers' Board, Dhulia, praying for help in securing employment. This application was forwarded to the Divisional Controller of the State Transport Corporation at Dhulia and Dongarsing was asked by the Corporation to make a formal application on a printed form to be obtained on payment of As.-2-. Accordingly Dongarsing applied for a printed form sometime in November, 1955 which he received on 19th November, 1955. Thereafter Dongarsing met Sheikh Ahmed (respondent No. 2) who was in service in the said department at Jamner and asked him for help. Sheikh Ahmed told Dongarsing that Jagatsing (respon-

dent No. 1) who was an officer in the State Transport Corporation at Dhulia would be able to secure a job for Dongarsing provided he was paid money. Consequently, Dongarsing went to Dhulia along with Sheikh Ahmed and met Jagatsing and it was settled that Dongarsing would pay Rs. 50 as bribe to Jagatsing for securing the job of a driver. Rs. 25 were immediately paid on that very day, namely 25th November, 1955 and the remaining amount Rs. 25 was paid a fortnight later about 9th December, 1955. Dongarsing was informed sometime at the end of January or beginning of February, 1956 that his application for the post of driver had been rejected. He then went to Jagatsing again and asked him to return the sum of Rs. 50 already paid or secure the job for him. Jagatsing replied that he could not return the money as it had already been paid to other persons but said that if he paid another Rs. 50 Jagatsing might be able to procure the job for him. So another printed form of application was procured by Jagatsing and Dongarsing filled it up and gave it to Jagatsing. By this time however Dongarsing had become suspicious of the *bona fides* of Jagatsing and he therefore approached the anti-corruption department. So a trap was laid for catching Jagatsing and Rs. 30 in currency notes were given to Dongarsing for passing on to Jagatsing after applying anthracene powder to them. Eventually on 20th February, 1956, this amount of Rs. 30 was passed on by Dongarsing to Jagatsing at about 3 P.M. After the money was paid the police caught Jagatsing who had the money in his hands but threw it down on being challenged. It was however found that particles of anthracene powder were on the thumb and two fingers of Jagatsing and also on the seam of the right pocket of the pant of his trousers. The currency notes were then picked up and the necessary panchnama was prepared and after further investigation Jagatsing and Sheikh Ahmed were prosecuted.

Jagatsing denied his guilt and said that he had nothing to do with the appointment of drivers and conductors and was never in a position to do anything for Dongarsing. Sheikh Ahmed also denied his guilt and said that all that he did was to help Dongarsing in filling up the printed form but that he never told Dongarsing that he had to pay a bribe to Jagatsing in order to get the job.

The trial Court found on the facts that the prosecution had proved its case beyond reasonable doubt and that Jagatsing had accepted the currency notes which Dongarsing gave him on 20th February, as illegal gratification as a motive for securing the job for Dongarsing. As to Sheikh Ahmed the trial Court held that it would not be safe to accept the testimony of Dongarsing as to the payment of the two sums of money of Rs. 25 in November, and December, 1955 as he was an accomplice. As to the payment of Rs. 30 on 20th February, the trial Court held that Sheikh Ahmed was not present at that time and could not be held to be guilty of abetment of that crime, particularly as the letter Exhibit 29 on which the charge of abetment was based was never handed over by Dongarsing to Jagatsing. The trial Court further held as to Jagatsing that he was not a public servant within the meaning of section 43 of the Road Transport Corporations Act, No. LXIV of 1950 (hereinafter referred to as the Transport Act). It therefore acquitted both the respondents.

This was followed by an appeal by the State to the High Court of Bombay. The High Court apparently accepted the finding of the trial Court as to the payment of Rs. 30 as bribe to Jagatsing. The High Court then addressed itself to questions of law raised before it. These questions were: (1) whether Jagatsing was a public servant within the meaning of section 21 of the Indian Penal Code read with section 43 of the Transport Act; and (2) whether the ingredients of section 161 of the Indian Penal Code of which Jagatsing had been charged had been proved. The High Court did not decide the first question in the view it took of the second question. Relying on the judgment of this Court in *The State of Ajmer v. Shivji Lal*¹ the High Court held that as there was no averment as to the public servant who was

1. (1959) S.C.J. 911 : (1959) M.L.J. (Cr.) 589 : (1959) Supp. 2 S.C.R. 739.

to be approached either in the complaint or in the evidence, it had no option but to confirm the acquittal ordered by the Special Judge in view of *Shivjilal's case*¹. As the High Court acquitted Jagatsing, it held that there could be no case of abetment against Sheikh Ahmed. The State of Maharashtra has come to this Court by Special Leave against the view taken by the High Court acquitting the two respondents.

We shall first deal with the view taken by the High Court on the second question. We must say with respect that the High Court has read more in the decision in *Shivjilal's case*¹ than what was decided therein. In that case the bribe was said to have been given to Shivjilal who was a teacher in a Railway School at Phulera. The purpose for which the bribe was said to have been given was to secure a job for Premsingh who had given the bribe, in the Railway Running Shed at Abu Road. On these facts it is obvious that Shivjilal would have nothing to do with the securing of a job at the Railway Running Shed at Abu Road, for he was in no way connected with that shed and could only approach some officer at Abu Road for procuring the job. In these circumstances Shivjilal could only secure the job for Premsingh by rendering or attempting to render service to Premsingh with some public servant at Abu Road who would be in a position to secure the job there. That case therefore clearly fell under that part of section 161 (omitting the unnecessary words) which reads as follows :—

“Whoever being a public servant accepts from any person for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for rendering or attempting to render any service or disservice to any person with any public servant.”

It was in that connection that this Court emphasised in *Shivjilal's case*¹ that where the charge is under this part of section 161, the charge should specify the other public servant who was to be approached for rendering service or disservice. At the same time this Court did not lay down in *Shivjilal's case*¹, that if the other public servant is not specified in the charge, the trial would be bad. Where the public servant is not specified in the charge that would only mean that there is defect in the charge and such a defect would be curable under section 537 of the Code of Criminal Procedure unless such error or omission or irregularity or misdirection has in fact occasioned a failure of justice. This Court then went on to point out in *Shivjilal's case*¹ that besides the omission to indicate the other public servant in the charge there was nothing in the complaint, in the charge-sheet submitted by the police and in the evidence to show who was the other public servant with whom service or disservice would be rendered by Shivjilal. It was in these circumstances that this Court held that one of the main ingredients of that part of section 161 which applied to that case had not been proved.

The facts in the present case however are different. It is not in dispute that Jagatsing was in employ in the very office which would make the appointment of the driver for which job Dongarsing had applied. It is also in evidence that Dongarsing had approached Jagatsing directly, may be in the company of Sheikh Ahmed, and Jagatsing had promised to secure a job in his own office for Dongarsing, if he was paid a certain amount. In such a case we are of opinion that another part of section 161 would apply which (again omitting the unnecessary words) reads as follows :—

“Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person.”

It is this part of section 161 which would in our opinion apply to the facts of the present case for Jagatsing was in that office and took the money for doing an official act, i.e. an appointment of a driver by his office. It is true that Jagatsing in his statement said that he had no concern with appointment of drivers and conductors and was not in a position to do anything for Dongarsing in the matter of securing

employment for him. He was however a senior assistant in the traffic section in the corporation at Dhulia; thus even if he was not directly in a position to make the appointment himself that would not in our opinion make any difference to his guilt if he took the money in order to get an official act done *viz.*, Dongarsing's appointment in that office. The relevant part of section 161 which applies not only refers to receiving of gratification by the man for himself but also for any other person so long as he is in a position by virtue of his being a public servant to do or forbear to do any official act or to show or forbear to show in the exercise of his official functions favour or disfavour to any person. Where therefore a person is a public servant in the very office where the appointment is to be made and takes money in order to get the appointment made there is no further question of the charge or evidence indicating who was the other public servant with whom the service would be rendered. The part of section 161 which was considered in *Shivjilal's case*¹, was an entirely distinct part where it would be necessary to show who was the other public servant who would be approached. But on the facts of the present case it is not necessary to show whether there was any other public servant who was to be approached where the public servant taking the money is himself in the very office by which the appointment would be made. In such a case the person would be taking money for himself or for any other person in his office in order to do any official act or get it done. The High Court therefore was not right in applying the ratio in *Shivjilal's case*¹ to the facts of this case, for it was not necessary on the facts of this case to indicate who was the other public servant with whom service would be rendered. It was enough if it was shown that money was paid to a public servant in a particular department by which an order would be made and if it was taken for doing any official act in that department. The reason therefore that has been given by the High Court in acquitting Jagatsing and in consequence Sheikh Ahmed cannot be upheld.

That brings us to the first question which was posed before the High Court and which the High Court did not decide, namely, whether Jagatsing was a public servant within the meaning of section 21 of the Indian Penal Code read with section 43 of the Transport Act. This question was decided by the trial Court in favour of Jagatsing and we think fit to decide this question ourselves even though we have not had the advantage of the High Court's view in the matter, for we do not think that we should remand the case after this lapse of time for this purpose to the High Court. It is not in dispute that Jagatsing would not be a public servant under section 21 as it stood before the amendment by Act II of 1958 by which the twelfth clause was added to the section in these terms :—

“Every officer in the service or pay of a local authority or of a Corporation engaged in any trade or industry which is established by a Central, Provincial or State Act or of a Government company as defined in section 617 of the Companies Act, 1956.”

This clause was not there when the present offence was committed in 1956 and we have therefore to see whether section 43 of the Transport Act makes Jagatsing a public servant for purposes of section 21 of the Indian Penal Code. Section 43 is in these terms :—

“All members of a Corporation, and all officers and servants of a Corporation, whether appointed by the State Government or the Corporation, shall be deemed when acting or purporting to act in pursuance of the provisions of this Act or of any other law, to be public servants within the meaning of section 21 of the Indian Penal Code.”

Now if the words “when acting or purporting to act in pursuance of any of the provisions of this Act or of any other law” had not been there in section 43, there would have been no difficulty in holding that Jagatsing was a public servant under section 21 of the Indian Penal Code. The difficulty is created by these words and the argument on behalf of the respondents is that the effect of these words in section 43 is that all officers and servants of a corporation are public servants only when they are acting or purporting to act in pursuance of any of the provisions of the Transport

1. (1959) S.C.J. 911 : (1959) M.L.J. (Cr.) 589 ; (1959) Supp. 2 S.C.R. 739.

Act or of any other law, and that taking of bribe is not acting or purporting to act in pursuance of any of the provisions of the Act or of any other law.

The question whether sanction of the Government was required under section 197 of the Code of Criminal Procedure where any public servant is accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty came up for consideration by the Privy Council in cases under sections 161 and 409 of the Indian Penal Code against public servants. In *Gill v. The King*,¹ the Privy Council held that prosecution for taking a bribe under section 161 of the Indian Penal Code did not require sanction under section 197 because taking of a bribe was not acting or purporting to act in the discharge of his official duty of a public servant.

Again in *Hori Ram Singh v. The Crown*,² the Federal Court held that sanction was required for prosecution of a public servant for an offence under section 477-A as his official capacity is involved in the very act complained of as amounting to a crime; but that no sanction was required for a charge under section 409, because the official capacity is material only in connection with the entrustment and does not necessarily enter into the later act of misappropriation or conversion which is the act complained of. This view of the Federal Court was approved by the Privy Council in *Gill's case*.¹

We may also refer to two cases of this Court in this connection, namely, *Shree-kantiah Ramayya Munipalli v. The State of Bombay*³ and *Amrik Singh v. State of Pepsu*.⁴ In the first case it was pointed out that section 197 should not be construed too narrowly, for if that was done it could never be applied as it is no part of an official's duty to commit an offence and never can be. But it was not the duty of an official which had to be examined so much as his act, because an official act could be performed in the discharge of official duty as well as in dereliction of it. In that case misappropriation was facilitated by a public servant allowing certain stores to pass out of the Engineering Depot at Dehu and it was held that sanction was necessary because misappropriation could never have been committed if the official act of passing out the stores had not been done. Therefore the public servant who allowed the stores to pass out and thus was guilty of abetment of misappropriation could not be prosecuted without sanction as his act in passing out the stores which facilitated the misappropriation was an official act.

The matter was examined again in the second case and the position was summed up there in these words at page 1307 :—

"It is not every offence committed by a public servant that requires sanction for prosecution under section 197 (1) of the Code of Criminal Procedure; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution."

In that case, however, it was held that sanction was necessary for prosecution under section 509 of the Indian Penal Code because the accused in that case claimed that he had paid the amount to the person to whom it was due and had taken a receipt from him.

Similar considerations would apply when one has to decide whether an officer or servant of a corporation was acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law, for it is only if he is so acting that he can be said to be a public servant within the meaning of section 43.

1. (1948) 2 M.L.J. 6 : (1948) F.C.R. 19 : (1948) F.L.J. 13 : L.R. 75 I.A. 41.

2. (1939) F.L.J. 153 : (1939) 2 M.L.J. (Sup.) 23 : (1939) F.C.R. 159.

3. (1955) S.C.J. 233 : (1955) S.C.R. 1177.

4. (1955) S.C.J. 334 : (1955) 1 M.L.J. (S.C.) 198 : (1955) S.C.R. 1302 (1307).

Now so far as the receiving of a bribe is concerned, it cannot in our opinion be brought within the scope of acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law. It cannot be the case of the prosecution that Jagatsing while acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law would take this money. Therefore when he took this money from Dongarsing he could not be said to be acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law. Therefore he could not be a public servant within the language of section 43 which requires that an officer or servant of a corporation should be acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law in order that he may be a public servant within the meaning of section 21 of the Indian Penal Code.

It is urged that in this view all members, officers and servants of a corporation would be free to take bribes and would never be liable to be prosecuted under section 161 and that this could not have been the intention behind section 43. It is certainly unfortunate that such a result should follow from the words used in section 43. But the words are clear and it seems that members, officers and servants of the corporation were intended by the Legislature to be public servants only when they were acting or purporting to act in pursuance of the provisions of the Transport Act or of any other law and not otherwise. As taking of bribe cannot under any circumstances be shown to amount to acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law, the person taking a bribe cannot be said to be a public servant within the meaning of section 21 of the Indian Penal Code in view of the clear words of section 43. The difficulty has however now been obviated by the amendment of section 21 by the addition of the twelfth clause therein. But as section 21 stood at the relevant time we have to take recourse to section 43 of the Transport Act and the words of that section make it quite clear that members, officers and servants of corporation can only be public servants when they act or purport to act in pursuance of any of the provisions of the Transport Act or of any other law; and taking of a bribe can never amount to acting or purporting to act in pursuance of any of the provisions of the Transport Act or of any other law. In these circumstances the trial Court was right in acquitting Jagatsing on the ground that he was not a public servant. It follows therefrom that Sheikh Ahmed must also be acquitted.

We therefore dismiss the appeal, though for different reasons.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Memon Abdul Karim Haji Tayab, Central Cutlery Stores, Veraval ... *Appellant**

v.

The Deputy Custodian-General, New Delhi and others ... *Respondents.*

Administration of Evacuee Property Act (XXXI of 1950), section 48 (as replaced by Act XCI of 1956)—Applicability and scope—How far retrospective in operation.

Sub-sections (1) and (2) of section 48 (amended by Act XCI of 1956) of Administration of Evacuee Property Act are clearly procedural and would apply to all cases which have to be investigated in accordance therewith after 22nd October, 1956 (when the amendment came into force) even though the claim may have arisen before the amended section was inserted in the Act. Procedural amendments of law apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the action may be based may be of an anterior date.

The right to an amount due to an evacuee on a deposit which vested in the Custodian would be the right of the evacuee to recover the amount from the debtor and that would be incorporeal property in the form of an actionable claim. It is in respect of that claim that the Custodian can proceed under section 48, sub-sections (1) and (2), to recover the sum payable to him in respect of that property, namely the actionable claim. The Custodian could not take action under section 9 of the Act by physically seizing the amount because the amount cannot be treated as specific property which is liable to be seized under that section. Section 48 (1) and (2) therefore apply to the case.

The question whether section 48 (3) will apply even to cases where the recovery had become barred under the Limitation Act before 22nd October, 1956 was not considered as the point that recovery would be barred even if the amount was treated as a deposit and not a loan was raised for the first time only in the Supreme Court.

Appeal by Special Leave from the Judgment and Order dated 16th January, 1961 of the Deputy Custodian-General, New Delhi in Appeal No. 172-A/SUR/1960.

M. G. Setalvad, Senior Advocate (*Atiqur Rehman* and *K. L. Hathi*, Advocates, with him), for Appellant.

C. K. Daphtary, Attorney-General for India (*K. S. Chawla* and *B. R. G. K. Achar*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the order of the Deputy Custodian-General, and the question involved is whether the appellant is liable to pay Rs. 85,000 to the Custodian. The matter has a long history behind it which it is necessary to set out in order to understand the point now in dispute in the present appeal. The money in question was deposited with the appellant by his sister as far back as January, 1946. The total amount deposited was Rs. 90,000, but the appellant's sister took back Rs. 5,000 with the result that the balance of Rs. 85,000 remained deposited with the appellant. The appellant's sister thereafter migrated to Pakistan sometime between June to August, 1949. Sometime later, the Assistant Custodian, Veraval, called upon the appellant to pay this sum lying in deposit under section 48 of the Administration of Evacuee Property Act, No. XXXI of 1950 (hereinafter referred to as the Act). The appellant contested the matter on the ground that the money had been given to him as a loan and its recovery was barred in January, 1949 long before his sister had migrated to Pakistan, and therefore the amount could not be recovered from him. The Assistant Custodian however directed the recovery of the amount as arrears of land revenue under section 48 of the Act, as it then stood. The matter was taken in appeal before the Custodian, Saurashtra, but the appeal failed. The appellant then went in revision to the Custodian-General, and the revision also failed. Then followed a writ petition by the appellant before the Saurashtra High Court in 1955. The writ petition was dismissed by a learned Single Judge; but on Letters Patent Appeal the appellant succeeded, the High Court holding that the amount was not recoverable under section 48 of the Act as it stood at the relevant time. This decision was given on 9th December, 1957. In the meantime, section 48 had been amended on 22nd October, 1956 and we shall refer to this amendment in due course.

After the appellant had succeeded in the High Court, another notice of demand was served on him by the Assistant Custodian on 22nd January, 1958, and after hearing the objections of the appellant, the Assistant Custodian again directed the amount to be recovered. The appellant then took the matter in appeal to the Custodian-General. The Custodian-General allowed the appeal in August, 1958 and remanded the proceedings for further enquiry as directed by him. The Custodian-General then held that section 48 as amended applied to the fresh proceedings which began on the notice issued by the Assistant Custodian in January, 1958. He further held that the amount was recoverable under the amended section 48 provided it was due to the evacuee on the date the property of evacuee vested in the Custodian. He was therefore of opinion that it would have to be determined when the sister of the appellant migrated and whether the amount was due to her on the date of her migration and had not become barred by the law of limitation on that date. He was further of opinion that the question whether the transaction amounted to a loan or a deposit had to be determined as there were different periods

of limitation for these two types of transactions. He therefore remanded the matter for disposal after finding the facts in accordance with the directions given by him. After the remand further evidence was taken and it was held that the amount in question was payable by the appellant as it was a deposit and was still recoverable when the property vested in the Custodian. Thereupon the appellant again went in appeal to the Custodian-General and that appeal was dismissed on 6th February, 1961. Then the appellant applied to this Court for Special Leave which was granted; and that is how the matter has come up before us.

Two questions have been urged before us on behalf of the appellant. The first is whether the amended section 48 can be applied to the present case. The second is whether the claim of the Custodian is barred even on the basis of the transaction between the appellant and his sister being a deposit and not a loan.

The amended section 48 came into the Act by Act No. XCI of 1956 from 22nd October, 1956 and runs as follows:—

“48. *Recovery of certain sums as arrears of land revenue.*—(1) Any sum payable to the Government or to the Custodian in respect of any evacuee property, under any agreement, express or implied lease or other document or otherwise howsoever, may be recovered in the same manner as an arrear of land revenue.

(2) If any question arises whether the sum is payable to the Government or to the Custodian within the meaning of sub-section (1), the Custodian shall, after making such inquiry as he may deem fit, and giving to the person by whom the sum is alleged to be payable an opportunity of being heard, decide the question; and the decision of the Custodian shall, subject to any appeal or revision under this Act, be final and shall not be called in question by any Court or other Authority.

3) For the purposes of this section, a sum shall be deemed to be payable to the Custodian notwithstanding that its recovery is barred by the Indian Limitation Act, 1908 (IX of 1908), or any other law for the time being in force relating to limitation of action.”

It will be seen that this is mainly a procedural section replacing the earlier section 48 and lays down that sums payable to the Government or to the Custodian can be recovered thereunder as arrears of land revenue. The section also provides that where there is any dispute as to whether any sum is payable or not to the Custodian or to the Government, the Custodian has to make an enquiry into the matter and give the person raising the dispute an opportunity of being heard and thereafter decide the question. Further, the section makes the decision of the Custodian final subject to any appeal or revision under the Act and not open to question by any Court or any other authority. Lastly, the section provides that the sum shall be deemed to be payable to the Custodian notwithstanding that its recovery is barred by the Indian Limitation Act or any other law for the time being in force relating to limitation of action. Sub-sections (1) and (2) are clearly procedural and would apply to all cases which have to be investigated in accordance therewith after 22nd October, 1956, even though the claim may have arisen before the amended section was inserted in the Act. It is well settled that procedural amendments to a law apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the action may be based may be of an anterior date. Therefore, when the Assistant Custodian issued notice to the appellant on 22nd January, 1958 claiming the amount from him, the recovery could be dealt with under sub-sections (1) and (2) of the amended section 48, as they are merely procedural provisions. But it is urged on behalf of the appellant that sub-section (1) in terms does not apply to the present case, and if so, sub-section (2) would also not apply. The argument is that under sub-section (1) it is only any sum payable to the Government or to the Custodian *in respect of* any evacuee property which can be recovered as arrears of land revenue. Therefore, the argument runs, evacuee property itself cannot be recovered under sub-section (1), for that sub-section only provides for recovery of any sum payable in respect of any evacuee property. In this connection reference has been made to section 9 of the Act, which lays down that if any person in possession of any evacuee property refuses or fails on demand to surrender possession thereof to the Custodian, the Custodian may use or cause to be used such force as may be necessary for taking

possession of such property and may, for this purpose, after giving reasonable warning and facility to any woman not appearing in public to withdraw, remove or break open any lock, bolt or any door or do any other act necessary for the said purpose. The argument is that the Custodian can only take action for recovery of evacuee property under this section. We are of opinion that the argument is misconceived. Section 9 deals with the recovery of immovable property or specific movable property which can be physically seized; it does not deal with incorporeal evacuee property which may vest in the Custodian and which, for example, may be of the nature of an actionable claim. So far as actionable claims are concerned, they are dealt with by section 48 as amended read with section 10 (2) (1). It is also a misconception to think that the amount of Rs. 85,000 which is involved in this case is actually evacuee property. It is true that under section 48 as amended, the Custodian can take action for recovery of such sums as may be due in respect of any evacuee property and if the sum of Rs. 85,000 which was deposited with the appellant is actually evacuee property, the Custodian may not be able to take action under section 48 (1) and (2) in respect of the same. But the property which vested in the Custodian was not the actual money *in specie* lying with the appellant who must be treated as a banker with respect to the property with him; on the other hand the property which vested in the Custodian would be the right of the appellant's sister to recover the amount from the appellant and that would be incorporeal property in the form of an actionable claim. It is in respect of that actionable claim that the Custodian can proceed under section 48, sub-sections (1) and (2), to recover the sum payable to him in respect of that property, namely, the actionable claim. The contention of the appellant that section 48 (1) will not apply to the recovery of this sum of money must therefore fail and the Custodian would have the right to recover this sum of money as it is payable in respect of the evacuee property of the appellant's sister, namely, the right which she had to recover the sum from the appellant, and it is this right which vested in the Custodian. The Custodian could not take action under section 9 by physically seizing the amount because the amount cannot be treated as specific property which is liable to be seized under that section. If the appellant's sister had the right to recover this amount from the appellant that right would be incorporeal property which would vest in the Custodian and in respect of which action could be taken under section 48 as amended and not under section 9 of the Act. The contention of the appellant that section 48 (1) and (2) do not apply to this case must therefore fail.

The next contention is that in any case treating the amount as a deposit the right to recover it had become barred and therefore the Custodian could not recover it under this section and that sub-section (3) of section 48 would not apply as it affects vested rights and is not procedural in nature and therefore could not be applied retrospectively. Some dates would be relevant in this connection. On the findings of the authorities concerned, it appears that the deposit was made sometime in January, 1946. The appellant's sister migrated sometime between June to August, 1949. According to the law in force in that area, at the relevant time on the date of migration of the appellant's sister, she became an evacuee and her property would vest in the Custodian on such date. So her right to recover this amount from the appellant would vest in the Custodian sometime between June to August, 1949, if it was still alive under the law of limitation that in such cases only the remedy is barred though the right remains. Further as this was a deposit, limitation would run at the earliest from the date of demand and there is no evidence that any demand was made by the appellant's sister for the return of the money before she migrated to Pakistan. Therefore, the period of limitation had not even begun to run on the date the appellant's sister migrated to Pakistan, assuming Article 60 of the Limitation Act IX of 1908 applied. Consequently the right of the appellant's sister to recover the amount vested in the Custodian and was not barred by limitation at the time when she became an evacuee. The demand was made for the first time on 10th January, 1952, by the Assistant Custodian and time would run from that date, at the earliest.

Then it is urged that even if the actionable claim vested in the Custodian, the demand in this case was made for the first time on 10th January, 1952, and therefore under Article 60 of the Limitation Act, the right to recover the amount would be barred in January, 1955, and consequently no proceeding could be taken under section 48 to recover the same after January, 1955. It is further urged that the amended Act came into force on 22nd October, 1956, and sub-section (3) would only apply to such cases where the limitation had not expired before that date. We do not think it necessary for purposes of the present appeal to decide the effect of sub-section (3) of section 48, for the appellant never contested before the authorities concerned that recovery could not be made under section 48 even if the amount was treated as a deposit. What the appellant had contended before the authorities concerned was that recovery would be barred as the amount was given to him as a loan. The appellant therefore cannot now for the first time in this Court take the plea that recovery could not be made under section 48 and sub-section (3) thereof would not apply even if the amount is treated as a deposit. This contention thus raised in this Court for the first time raises a question as to the effect of sub-section (3) of section 48. Besides the effect of section 48 (3), it is contended for the respondent that if this question had been raised before the proper authorities evidence might have been led to show that the recovery was not barred even for the case proceeded in the assumption that under Article 60 of the Limitation Act applied and proper defences could have been raised as for example the conditions on which the deposit was made, *i.e.*, either in demand or otherwise and acknowledgments of liability made by the appellant. Such defence would have raised questions of fact which have never been investigated. Therefore it is urged that the appellant should not be allowed to raise the point that the recovery would be barred even if the amount was treated as a deposit and should be confined to his case that this was a loan and not a deposit, for he never pleaded at any time before the authorities concerned that even if it was a deposit the recovery would be barred by time. We are of opinion that there is force in this contention on behalf of the respondents and we are not prepared to allow the appellant to raise the question whether the recovery would be barred even if the amount is treated as a deposit. In this view of the matter, it would not be necessary to consider the exact effect of section 48 (3) and to decide whether it will apply even to cases where the recovery had become barred under the Limitation Act before 22nd October, 1956. We therefore do not allow the appellant to raise the point that the recovery would be barred even if the amount was a deposit.

The appeal therefore fails and is hereby dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—M. HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.

S. M. Karim *alias* Tamanna Saheb

.. *Appellant**

v.

Mst. Bibi Sakina

.. *Respondent.*

Civil Procedure Code (V of 1908), section 66—Scope and effect—Benamidar purchaser—Transferee from real owner barred from claiming property from certified purchaser.

The purchaser from the real owner cannot sustain a claim for declaration of title and possession based on the *benami* nature of the purchase in Court sale in the name of another person. Section 66 of the Civil Procedure Code bars it. That section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims. The protection is available not only against the real purchaser but also against anyone claiming through him. Section 66 (2) (providing for suits by third persons) refer to claims of creditors and not to the claims of transferees from the real owner which are dealt with in section 66 (1).

If the real owner had been in uninterrupted adverse possession and if the possession ripens into title and he is dispossessed, he can sue to obtain possession, for he does not then rely on the *benami* nature of the transaction. But such claim must be clearly made in the pleading and proved.

Appeal by Special Leave from the Judgment and Decree dated 3rd December, 1959, of the Patna High Court in Appeal from Appellate Decree No. 642 of 1957.

S. P. Varma, Advocate, for Appellant.

S. P. Sinha, Senior Advocate (*Shahzadi Mohiuddin* and *Shaukat Hussain*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is an appeal by Special Leave against the judgment of the High Court of Patna reversing the concurrent judgments of the two Courts below, and ordering the dismissal of the suit of the appellant. The appellant is Syed M. Karim, son of one Syed Aulad Ali and the respondent Mst. Bibi Sakina (defendant No. 1) is transferee of the properties in dispute from Hakim Alam (defendant No. 2), son-in-law of Syed Aulad Ali. The appellant, in his turn, is a transferee of the same properties from his father Syed Aulad Ali.

The suit was brought for declaration of title and confirmation of possession or in the alternative for delivery thereof against several defendants in respect of this and other properties. We are not concerned in this appeal with the other defendants or the other properties. This part of appellant's suit was based on the allegation that Syed Aulad Ali had purchased the suit properties on 28th May, 1914, at a Court sale, *benami* in the name of his son-in-law Hakim Alam. The reason for the *benami* purchase was that under the rules of the Darbhanga Raj where Syed Aulad Ali was employed, persons serving in certain capacities were prohibited from purchasing at Court sales. The sale certificate was issued in the name of Hakim Alam who was then living with Syed Aulad Ali. On 6th January, 1950, Syed Aulad Ali sold the property to his son the present appellant and Hakim Alam sold the property in his turn to Bibi Sakina and the present suit was filed for the above reliefs.

In this appeal, it has been stressed by the appellant that the findings clearly establish the *benami* nature of the transaction of 1914. This is, perhaps, true but the appellant cannot avail himself of it. The appellant's claim based upon the *benami* nature of the transaction cannot stand because section 66 of the Code of Civil Procedure bars it. That section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words were, no suit shall be maintained against a certified purchaser, and the change was made to protect not only the certified purchaser but any person claiming title under a purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone claiming through him. In the present case, the appellant as plaintiff was hit by the section and the defendants were protected by it.

It is contended that the case falls within the second sub-section under which a suit is possible at the instance of a third person who wishes to proceed against the property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner. Reliance is placed upon the transfer by Syed Aulad Ali in favour of the appellant which is described as a claim by the transferee against the real owner. The words of the second sub-section refer to the claims of creditors and not to the claims of transferees. The latter are dealt with in the first sub-section, and if the meaning sought to be placed on the second sub-section by the appellant were accepted, the entire policy of the law would be defeated by the real purchaser making a transfer to another and the first sub-section would become almost a dead letter. In our opinion, such a construction cannot be accepted and the plaintiff's suit must be held to be barred under section 66 of the Code.

As an alternative, it was contended before us that the title of Hakim Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the *benami* nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two Courts below. The plea of adverse possession is raised here. Reliance is placed before us on *Sukan v. Krishnan Nand*¹, and *Sri Bhagwan Singh and others v. Ram Basi Kuer and others*², to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, *benami* in the name of his son-in-law Hakim Alam, Syed Aulad Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakim Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered, because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in *Bishun Dayal v. Kesho Prasad and another*³, the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea.

Reading the plaint as a whole, we agree with the High Court that a case based on possession after the purchase was not stated in the plaint and the decision of the High Court in the circumstances of this case was therefore proper. The appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, K.C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Shyam Behari and others

.. *Appellants**

v.

The State of Madhya Pradesh and others

.. *Respondents.*

Kaira District Co-operative Milk Producers Union, Ltd.

.. *Intervener.*

Land Acquisition Act (I of 1894), section 6 (1) Proviso—Scope and Effect—Notification stating that the land was required for a public purpose namely "for The Premier Refractory Factory and work connected therewith"—If can be construed as "required for a company".

No notification under section 6 of the Land Acquisition Act can be made where the entire compensation is to be paid by a company, declaring that the acquisition is for a public purpose. The notification to be valid in such a case must declare that the land was required for a company.

1. I.L.R. 32 Pat. 353.

2. A.I.R. 1957 Pat. 157.

* C.A. No. 177 of 1962.

3. A.I.R. 1940 P.C. 202.

A "factory" is something very different from a "Company" and may belong to a company or to Government or to a local authority or even to an individual. The mere fact that the public purpose declared in the notification (in the instant case) was for "The Premier Refractory Factory and work connected therewith" cannot therefore lead to the inference that the acquisition was for a company.

Accordingly the impugned notifications were invalid in view of the Proviso to section 6 (1) of the Act and all proceedings following on such notification would be of no effect under the Act.

Appeal by Special Leave from the Judgment and Order dated 8th August, 1961, of the Madhya Pradesh High Court in Miscellaneous Petition No. 81 of 1961.

Naunit Lal, Advocate, for Appellant.

I. N. Shroff, Advocate, for Respondents.

Rajani Patel and *I. N. Shroff*, Advocates, for Intervener.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the judgment of the Madhya Pradesh High Court. The appellants filed a writ petition in the High Court challenging the validity of a notification issued under section 6 of the Land Acquisition Act I of 1894 (hereinafter referred to as the Act). Their case was that they were owners of certain lands in Chhaparwah. On 8th July, 1960, a notification was issued under section 4 of the Act to the effect that certain land in village Chhaparwah was required for a public purpose, namely, "for the construction of buildings for godowns and administrative office". Thereafter proceedings appear to have been taken under section 5-A of the Act and an inquiry was made by the Collector. It may be mentioned that the acquisition proceedings were taken at the instance of the Premier Refractories of India (Private), Limited, Katni, which is a company. The Collector reported that the land was essential for the company and was needed for a public purpose and the objections of the land-owners had no substance. He therefore recommended that a declaration under section 6 of the Act might be made. He also reported that a draft agreement to be executed between the company and the Government as required by section 41 of the Act was being submitted along with a draft notification under section 6. This report was made on 17th October, 1960. On 3rd December, 1960, the notification under section 6 was issued stating that the State Government was satisfied that the land described in the annexure to the notification was required for a public purpose, namely, for the construction of buildings for godowns and administrative office, and hence the notification was issued. It may be noticed that the notification under section 6 did not say that the land was required for a company. Thereupon the appellants filed a writ petition in the High Court on 20th March, 1960, and their main contentions were two, namely, (1) that the notification under section 6 did not describe the land to be acquired with sufficient particularity and was therefore of no effect, and (2) that the notification mentioned that the land was required for a public purpose, though in actual fact the land was required for a company, which was entirely different from Government and therefore was invalid. Soon after the writ petition was filed, the State Government issued a fresh notification on 19th April, 1961. This notification was mainly under section 17 (1) read with section 17 (4) of the Act, which provides that in case of urgency, the State Government may direct the Collector before the award is made under certain circumstances to take possession of any waste or arable land needed for public purposes or for a company. Curiously enough this notification stated that the State Government also directed that the provisions of section 5-A would not apply, though as we have already stated, an inquiry under section 5-A had already been made before the notification of 3rd December, 1960 was issued. The notification further stated that it was declared under section 6 of the Act that the land was required for a public purpose, namely, "for the Premier Refractory Factory and work connected therewith". It appears however that the real reason for issuing this notification in this form was to make good the lacuna which appeared in the notification of 3rd December, 1960, inasmuch as the property to be acquired was not specified with sufficient particularity in that notification. It may be noticed that this notification of 19th April, 1961, treating it as a notification under section 6 as well, nowhere specified that the land

was required for a company ; it only stated that the land was required for a public purpose, namely, for the Premier Refractory and work connected therewith.

When the matter came to be argued before the High Court, the main point that was urged was that both the notifications under section 6 of 3rd December, 1960 and 19th April, 1961 were invalid; because the acquisition was not for a public purpose as stated therein ; in fact the acquisition was for a company which was entirely different from Government. The High Court apparently held that the substance of the notifications showed that the land was being required for a public purpose as well as for the purpose of a company. The High Court was further of the view that in so far as the declaration spoke of the acquisition of land for a public purpose it was ineffective, as admittedly the compensation for the property was to be paid wholly by the company and no part of it was to be paid out of public funds. Even so, the High Court held that declaration must be read in substance and in law as one for acquisition of land for a company, namely, the Premier Refractories of India (Private), Limited. In this view of the matter, the High Court dismissed the writ petition.

The only question that has been urged before us on behalf of the appellants is that the High Court was in error in reading the two notifications as in substance amounting to a declaration that the land was required for a company. Section 6 (1) of the Act requires that whenever any land is needed for a public purpose or for a company, a declaration shall be made to that effect. Further the Proviso to section 6 (1) provides that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority. This clearly contemplates two kinds of declarations. In the first place, a declaration may be made that land is required for a public purpose, in which case in view of the Proviso, the compensation to be awarded for the property to be acquired must come wholly or partly out of public revenues or some fund controlled or managed by a local authority. No declaration under section 6 for acquisition of land for a public purpose can be made unless either the whole or part of the compensation for the property to be acquired is to come out of public revenues or some fund controlled or managed by a local authority ; see *Pandit Jhandu Lal v. State of Punjab*¹. In the second place, the declaration under section 6 may be made that land is needed for a company in which case the entire compensation has to be paid by the company. It is clear therefore that where the entire compensation is to be paid by a company, the notification under section 6 must contain a declaration that the land is needed for a company. No notification under section 6 can be made where the entire compensation is to be paid by a company declaring that the acquisition is for a public purpose, for such a declaration requires that either wholly or in part, compensation must come out of public revenues or some fund controlled or managed by a local authority. In the present case it is not in dispute that no part of the compensation is to come out of public revenues or some fund controlled or managed by a local authority ; on the other hand the whole compensation was to be paid by the company. Therefore the notification under section 6 if it was to be valid in the circumstances of the present case had to declare that the land was needed for a company. No valid notification under section 6 could be made in the circumstances of this case declaring that the land was needed for a public purpose, for no part of compensation was to be paid out of public revenues or some fund controlled or managed by a local authority. That is why the High Court felt that the notification under section 6 declaring that the land was needed for a public purpose would in the circumstances of this case be ineffective. But the High Court went on to hold that the notifications under section 6 must in substance and in law be deemed to be for acquisition of land for a company in the present case. We are of opinion that this view of the High Court is incorrect. There is nothing in either of the two notifications dated 3rd December, 1960, and 19th April, 1961,

to show that the land was needed for a company. The notification of 3rd December, 1960, says in so many words that it was required for a public purpose, namely, for the construction of buildings for godowns and administrative office. No one reading this notification can possibly think that the land was needed for a company. Similarly the notification of 19th April, 1961, says that the land was needed for a public purpose, namely, for the Premier Refractory Factory and work connected therewith. Now the company for which the land in this case was in fact required is the Premier Refractories of India (Private) Limited, Katni. There is nothing in the notification of 19th April, 1961, to show that the land was needed for this company or any other company. All that the notification of 19th April, 1961, says is that the land was needed for a public purpose, and the public purpose mentioned there was that the land was required for the Premier Refractory Factory and work connected therewith. The High Court thought that in substance this purpose showed that the land was required for the company mentioned above. But we do not see how, because the purpose specified was for the Premier Refractory Factory and work connected therewith, it can be said that the notification declared that the land was needed for the company. It is not impossible for the Government or for a local body to own such a factory and construct works in connection therewith. The mere fact that the public purpose mentioned was for the Premier Refractory Factory and work connected therewith, therefore, cannot mean that the land was needed for a company; as one reads the notification of 19th April, 1961, one can only come to the conclusion that the land was needed for a public purpose, namely, for the construction of some work for a factory. There is no mention of any company anywhere in this notification and it cannot necessarily be concluded that the Premier Refractory Factory was a company, for a "factory" is something very different from a "company" and may belong to a company or to Government or to a local body or even to an individual. The mere fact that the public purpose declared in the notification was for the Premier Refractory Factory and work connected therewith cannot therefore lead to the inference that the acquisition was for a company. It follows that when the two notifications declared that the land was needed for a public purpose in a case where no part of the compensation was to come out of public revenues or some fund controlled or managed by a local authority, they were invalid in view of the Proviso to section 6 (1) of the Act. All proceedings following on such notifications would be of no effect under the Act.

We therefore allow the appeal and set aside the order of the High Court and quash the notifications under section 6 of the Act and restrain the respondents from taking any steps towards the acquisition of the land notified thereunder. As however the point on which the appellants have succeeded was not specifically taken in the writ petition, we direct the parties to bear their own costs throughout.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, K. C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

R. Abdul Quader & Co.

.. *Appellant**

v.

The Sales Tax Officer, Second Circle, Hyderabad

.. *Respondent.*

Hyderabad General Sales Tax Act (XIV of 1940), sections 11 (2) (cf. section 8-B (2) of Madras Act) and 20 (c)—Validity—Constitution of India (1950)—Schedule VII—List II Entries 54 and 26—If applicable.

Madras General Sales Tax Act (IX of 1939), section 8-B (2)—Validity.

Section 11 (2) of the Hyderabad Sales Tax Act is not within the competence of the State Legislature under Entry 54 of List II of the Constitution of India, Seventh Schedule. If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But

unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly for it is not a tax at all within the meaning of Entry 54 of List II nor can the State Legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly. Section 11 (2) has nothing to do with penalties. Section 20 (c) providing for penalty of conviction by a Magistrate for breach of section 11 (1) being consequential to section 11 (2) will fall along with it. The provisions cannot be upheld as regulating trade and commerce under Entry 26 of List II of the Seventh Schedule.

Section 8-B (2) of the Madras General Sales Tax Act, 1939, which in substance is to the same effect as section 11 (2) of the Hyderabad Sales Tax Act is invalid: *Indian Aluminium Co. v. The State of Madras*, (1962) 13 S.T.C. 967, must be held to be incorrect.

Appeal by Special Leave from the Judgment and Order dated 16th July, 1959, of the Andhra Pradesh High Court in Writ Petition No. 1123 of 1956.

K. R. Chaudhuri, Advocate, for Appellant.

A. Ranganadham Chetty, Senior Advocate (*B. R. G. K. Achar*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave against the order of the Andhra Pradesh High Court. The appellant filed a Writ Petition in the High Court questioning the validity of section 11 (2) of the Hyderabad General Sales Tax Act XIV of 1940 (hereinafter referred to as the Act). The material facts on which the petition was based were these. The appellant acted as agent in the then State of Hyderabad to both resident and non-resident principals in regard to sale of betel leaves. Under the Act betel leaves were taxable at the purchase point from 1st May, 1953, by virtue of a notification in that behalf. We are here concerned with the assessment period from 1st May, 1953 to 31st March, 1954, covered by the assessment year 1953-54. The appellant collected sales tax from the purchasers in connection with the sales made by it on the basis that the incident of the tax lay on the sellers and assured the purchasers that after paying the tax to the appellant, there would be no further liability on them. After realising the tax, however, the appellant did not pay the amount realised to the Government but kept it in the suspense account of its principals, namely, the purchasers. When the accounts were scrutinized by the Sales Tax Department, this was discovered and thereupon the appellant was called upon to pay the amounts realised to the Government. The appellant however objected to the payment on the ground that it was the seller and the relevant notification for the relevant period imposed tax at the purchase point, i.e., on the purchaser. This objection was overruled and the appellant was directed to pay the amount to Government.

The main contention raised on behalf of the appellant in the High Court was that section 11 (2) of the Act, which authorised the Government to recover from any person, who had collected or collects, after 1st May, 1950, any amount by way of tax otherwise than in accordance with the provisions of the Act, as arrears of land revenue, was beyond the legislative competence of the State Legislature. The argument was that the Act was passed under Entry 54 of List II of the Seventh Schedule to the Constitution, which enables the State Legislature to enact a law taxing transactions of the sale or purchase of goods. The entry therefore vested power in the State Legislature to make a law for taxing sales and purchases of goods and for making all necessary incidental provisions in that behalf for the levy and collection of sales or purchase tax. But it was urged that that entry did not empower the State Legislature to enact a law by which a dealer who may have collected a tax without authority is required to hand over the amount to Government, as any collection without the authority of law would not be a tax levied under the law and it would therefore not be open to the State to collect under the authority of a law enacted under Entry 54 of List II any such amount as it was not a tax on sale or purchase of goods. The High Court held section 11 (2) good as an ancillary provision with regard to the collection of sales or purchase tax and therefore incidental to the taxing power under Entry 54 of List II. Further the High Court took the view that assuming that Entry 54 of List II could not sustain section 11 (2), it could be sustained under Entry 26 of List II. Consequently the Writ Petition

was dismissed. The High Court having refused a certificate to appeal to this Court, the appellant obtained Special Leave and that is how the matter has come up before us.

It is necessary to read section 11 of the Act in order to appreciate the point urged on behalf of the appellant. Section 11 is in these terms :—

"11. (1) No person who is not registered as a dealer shall collect any amount by way of tax under this Act nor shall a registered dealer make any such collection before the 1st day of May, 1950, except in accordance with such conditions and restrictions, if any, as may be prescribed :

Provided that Government may exempt persons who are not registered dealers from the provisions of this sub-section until such date, not being later than the 1st day of June, 1950, as Government may direct.

(2) Notwithstanding anything to the contrary contained in any order of an officer or tribunal or the judgment, decree or order of a Court, every person who has collected or collects on or before 1st May, 1950, any amount by way of tax otherwise than in accordance with the provisions of this Act shall pay over to the Government within such time and in such manner as may be prescribed the amount so collected by him, and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue."

It will be seen that section 11 (1) forbids an unregistered dealer from collecting any amount by way of tax under the Act. That provision however does not apply in the present case, for the appellant is admittedly a registered dealer. Further section 11 (1) lays down that a registered dealer shall not make any such collection before 1st May, 1950, except in accordance with such conditions and restrictions, if any, as may be prescribed. This provision again does not apply, for we are not concerned here with any collection made by the appellant before 1st May, 1950. The prohibition therefore of section 11 (1) did not apply to the appellant. Then comes section 11 (2). It applies to collections made after 1st May, 1950 by any person whether a registered dealer or otherwise and lays down that any amount collected by way of tax otherwise than in accordance with the provisions of the Act shall be paid over to the Government and in default of such payment, the said amount shall be recovered from such person as if it were arrears of land revenue. It is clear from the words "otherwise than in accordance with the provisions of this Act" that though the amount may have been collected by way of tax it was not exigible as tax under the Act. Section 11 (2) thus provides that amounts collected by way of tax though not exigible as tax under the Act shall be paid over to Government, and if not paid over they shall be recovered from such person as if they were arrears of land revenue. Clearly therefore section 11 (2) as it stands provides for recovery of an amount collected by way of tax as arrears of land revenue though the amount was not due as tax under the Act.

The first question therefore that falls for consideration is whether it was open to the State Legislature under its powers under Entry 54 of List II to make a provision to the effect that money collected by way of tax, even though it is not due as a tax under the Act, shall be made over to Government. Now it is clear that the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State Legislature was directly legislating for the imposition of sales or purchase tax under Entry 54 of List II when it made such a provision, for on the face of the provision, the amount, though collected by way of tax, was not exigible as tax under the law. The provision however is attempted to be justified on the ground that though it may not be open to a State Legislature to make provision for the recovery of an amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the Legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries in the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation which in the present case, is a tax on sale or

purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the Legislative Entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such a provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the Legislature to provide that though the amount collected—may be wrongly—by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were a tax. The Legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what section 11 (2) has provided. Such a provision cannot in our opinion be treated as coming within incidental or ancillary powers which the Legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in section 11 (2) cannot be made under Entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry.

An attempt was made to justify the provision as providing for a penalty. But as we read section 11 (2) we cannot find anything in it to justify that it is a penalty for breach of any prohibition in the Act. Penalties imposed under taxing statutes are generally with respect to attempts at evasion of taxes or to default in the payment of taxes properly levied (see sections 28 and 46 of the Indian Income-tax Act, 1922). The Act also provides for penalty, for example, section 19 and section 20. The latter section makes certain acts or omissions of an assessee offences punishable by a Magistrate subject to composition under section 21. Section 11 (2) in our opinion has nothing to do with penalties and cannot be justified as a penalty on the dealer. Actually section 20 makes provision in clause (b) for penalty in case of breach of section 11 (1) and makes the person committing a breach of that provision liable, on conviction by a Magistrate of the First Class, to a fine. We are therefore of opinion that section 11 (2) cannot be justified under Entry 54 of List II, either as a provision for levying the tax or as an incidental or ancillary provision relating to the collection of tax. In this connection we may refer to clause (c) of section 20, which provides that any person who fails "to pay the amounts specified in sub-section (2) of section 11 within the prescribed time" shall on a conviction by a Magistrate be liable to fine. It is remarkable that this provision makes the person punishable for his failure to pay the amount which is not authorised as a tax at all under the law, to Government. It does not provide for a penalty for collecting the amount wrongly by way of tax from purchasers which may have been justified as a penalty for the purpose of carrying out the objects of the taxing legislation. If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly collected by the dealer. This cannot be done directly for it is not a tax at all within the meaning of Entry 54 of List II, nor can the State Legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly. We are therefore of opinion that section 11 (2) is not within the competence of the State Legislature under Entry 54 of List II.

The respondent in this connection relies on the decision of this Court in *The Orient Paper Mills Limited v. The State of Orissa*¹. That case in our opinion has no

application to the facts of the present case. In that case the dealer had been assessed to tax and had paid the tax. Later in view of the judgment of this Court in *State of Bombay v. The United Motors (India), Limited*¹, the amounts paid in respect of goods despatched for consumption outside the State were held to be not taxable. The dealer then applied for refund of tax, which was held to be not exigible. The refund was refused and the dealer went to the High Court by a Writ Petition claiming that it was entitled to refund under section 14 of the Orissa Sales Tax Act (which was the law under consideration in that case). The High Court allowed the petition in part and there were appeals to this Court both by the dealer and the State. In the meantime, the Orissa Legislature amended the law, by introducing section 14-A, in the Principal Act, which provided that refund could be claimed only by a person from whom the dealer had actually realised the amount as tax. That provision was challenged in this Court but was upheld on the ground that it came within the incidental power arising out of Entry 54 of List II. That matter dealt with a question of refund and it cannot be doubted that refund of the tax collected is always a matter covered by incidental and ancillary powers relating to the levy and collection of tax. We are not dealing with a case of refund in the present case. What section 11 (2) provides is that something collected by way of tax, though it is not really due as a tax under the law enacted under Entry 54 of List II must be paid to the Government. This situation in our opinion is entirely different from the situation in the *Orient Paper Mills, Limited's case*².

The respondent further relies on a decision of the Madras High Court in *Indian Aluminium Co. v. The State of Madras*³. That decision was with respect to section 8-B of the Madras General Sales Tax Act of 1939 as amended by Madras Act I of 1957. Though the words in section 8-B (2) were not exactly the same as the words in section 11 (2), with which we are concerned here, the provision in substance was to the same effect as section 11 (2). In view of what we have said above, that decision must be held to be incorrect.

Lastly, we come to the contention of the respondent that section 11 (2) is within the legislative competence of the State Legislature in view of Entry 26 of List II. That Entry deals with "trade and commerce within the State subject to the provisions of Entry 33 of List III." It is well settled that taxing entries in the Legislative Lists I and II of the Seventh Schedule are entirely separate from other entries. Entry 26 of List II deals with trade and commerce and has nothing to do with taxing or recovering amounts realised wrongly as tax. It is said that section 11 (2) regulates trade and commerce and the State Legislature therefore was competent under Entry 26 of List II to enact it. We have not been able to understand what such a provision has to do with the regulation of trade and commerce; it can only be justified as a provision ancillary to a taxing statute. If it cannot be so justified—as we hold that it cannot—we are unable to uphold it as regulating trade and commerce under Entry 26 of List II. There is in our opinion no element of regulation of trade and commerce in a provision like section 11 (2).

We are therefore of opinion that the State Legislature was incompetent to enact a provision like section 11 (2). We may also add that the provision contained in section 20 (c), being consequential to section 11 (2) will fall along with it. In consequence it was not open to the Sales Tax Officer to ask the appellant to make over what he had collected from the purchasers wrongly as sales tax. It is not disputed, as appears from the final assessment order of the Sales Tax Officer, that the appellant was not liable to pay the amount as sales tax for the relevant period. We therefore allow the appeal and quash the assessment order dated 27th September, 1956, in so far as it is based on section 11 (2). The appellant will get his costs in this Court as well as in the High Court.

K.S.

Appeal allowed.

1. (1953) S.C.J. 373 : (1953) S.C.R. 1069 :
(1953) 1 M.L.J. 743.

2. (1961) 2 S.C.J. 610 : (1962) 1 S.C.R. 549.
3. (1962) 13 S.T.C. 967.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI, JJ.

C. Rajagopalachari

.. Appellant*

v.

The Corporation of Madras and another

.. Respondents.

Madras City Municipal Act (IV of 1919), as amended by Act X of 1936, section 111 (1) (b) and rules under Schedule IV—Profession tax—If can be validly levied on pensioners—Government of India Act, 1935, section 143 (2) and Constitution of India (1950), Article 277—If saves the profession tax levied on pensioners by Madras City Municipal Council.

By reason of the repeal by Act X of 1936 of the original section 111 of the Madras City Municipal Act, the statutory charge to tax on pensions ceased in April, 1936. A charge (as required by the Amendment Act X of 1936) was imposed again under the resolution of the Council effective from 1st April, 1937, so that between April, 1936 to 31st March, 1937, no charge was imposed by virtue of any "law". This is a new levy of a tax which was not legally in existence on 31st March, 1937 and this cannot be supported under section 143 (2) of the Government of India Act, 1935.

The mere fact that the City Municipal Council had under Act X of 1936 the power to bring the tax into force by a resolution does not on a proper construction of section 143 (2) of the Government of India Act, 1935, bring it within the range of those taxes or duties which "were being lawfully levied" prior to the commencement of Part III of the Government of India Act, 1935, which alone are permitted to be continued to be levied notwithstanding that these duties were in the Federal List. The mere existence of a power to bring a tax into operation cannot be equated with "a tax which was being lawfully levied" before Part III of Government of India Act, 1936.

Under section 111 (i) (of Madras Act IV of 1919 as amended by Act X of 1936) the tax could be levied only in accordance with the rules in Schedule IV and as those rules did not make a provision for the levy of a tax on pensioners, it would follow that the tax "was not being legally levied" on them. (The rules were amended only from 1st April, 1942.) Section 18 of the Madras General Clauses Act can have no application.

The tax on the receipt of pension or on the income from investments which is referred to in the last part of section 111 (i) of the Municipal Act is in truth and substance a tax on income and the pensioner is no longer in employment but is only in receipt of income though it might be for past services in an employment.

Section 142-A (1) of the Government of India Act, 1935, corresponding to Article 276 (1) of the Constitution of India, 1950 will be applicable only if the tax imposed were one on a profession, trade, calling, or employment and in that event the section provides that such tax shall not be deemed to be a tax on income; but where the tax imposed is one not on a profession, etc. at all, it does not mean that the State might levy a tax on income and call it profession tax.

Appeal from the Judgment and Decree dated 1st May, 1961 of the Madras High Court in Writ Petition No. 975 of 1959.

R. M. Seshadri and R. Gopalakrishnan, Advocates, for Appellant.

R. Ganapathy Iyer, Advocate, for Respondent No. 1.

A. Ranganadham Chetty, Senior Advocate, (A. V. Rangam, Advocate with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Rajagopala Ayyangar, J.—This appeal comes before us by virtue of a certificate of fitness granted by the High Court of Madras under Article 133 (1) (c) of the Constitution against its judgment dismissing a petition filed by the appellant under Article 226 of the Constitution seeking a writ of prohibition against the Corporation of Madras challenging the constitutional validity of a notice requiring the appellant to pay profession tax.

The appellant held office as the last Governor-General of India. Under section 3 of Central Act XXX of 1951 the appellant is entitled to a pension of Rs. 15,000 per annum and has been drawing this sum residing in the City of Madras. The Corporation of Madras—the first respondent before us demanded profession tax

from the appellant under section 111 (1)(b) of the City Municipal Act, 1919, hereinafter called the Act for the year 1958-1959 on the ground of the appellant's residence within the City for the period therein specified and his drawing the pension to which he was entitled. The appellant addressed a communication to the Corporation asserting that this demand was illegal as the Corporation was empowered by the relevant constitutional provisions merely to levy a tax "on a profession, trade calling or employment" and that as he as a pensioner did not fall under any of these classes, the said demand was illegal. The authorities of the Corporation, however, insisted on compliance with the demand on the ground that under the express terms of the Act persons in receipt of pensions were also liable to the tax. The appellant thereupon filed a Writ Petition for the relief already set out, and as the validity of the State Act was impugned impleaded the State of Madras also as a respondent.

It would be seen from the foregoing that the question for consideration is whether the 1st respondent Corporation is entitled to levy a tax on pensioners in respect of the pensions received by them. In order to appreciate the submissions made to us by learned Counsel for the appellant it would be necessary to set out the history of the legislation in relation to profession tax and the impugned tax on persons in receipt of pensions applicable to the City of Madras because it is on a construction of these provisions that the learned Judges of the High Court have upheld the validity of the levy and dismissed the appellant's Writ Petition. For this purpose it is not necessary to travel to any period anterior to the enactment of the Madras City Municipal Act (Madras Act IV of 1919) which with certain amendments to be referred to presently is still in force. The Act received the assent of the Governor on 26th March, 1919, of the Governor-General in June, 1919, and came into force on publication in the Gazette which was in the same month. Having been enacted while the powers of the Local Legislatures were governed by the Government of India Act, 1915, the constitutional validity of the legislation is not open to any challenge. Section 111 (1) of this enactment ran :

"Every person not liable for the companies' tax, who, within the City and for the period prescribed in section 113, exercises a profession, art, trade or calling or holds an appointment, public or private, bringing him within one or more of the classes of persons specified in Taxation Rules in Schedule IV, shall pay by way of licence fee and in addition to any other licence fee that may be leviable under this Act a tax as determined under the said rules but in no case exceeding rupees five hundred in the half year and such tax may be described as the profession tax."

The section had two *Explanations* of which the second is material and this reads :

Explanation (2) : "A person in receipt of a pension paid from any source shall be deemed to be a person holding an appointment within the meaning of this section."

The next change in the relevant provision was effected by Madras City Municipal Amendment Act, 1936 (Madras Act X of 1936) which came into force on 14th April, 1936. By this amendment a new section—section 111 was substituted for the old one just set out, and under this *Explanation (2)* was deleted and the substituted provision ran :

"111. (1) If the Council by a resolution determines that a profession tax shall be levied, every person not liable to the tax, on companies, who after the date specified in the notice published under sub-section (2) of section 98-A in any half-year—

(a) exercises a profession, art or calling or transacts business or holds any appointment, public or private—

(i) within the City for not less than sixty days in the aggregate, or

(ii) outside the City but who resides in the City for not less than sixty days in the aggregate; or

(b) resides in the City for not less than sixty days in the aggregate and is in receipt of any pension or income from investments, shall pay in addition to any licence fee that may be leviable under this Act, a half-yearly tax assessed in accordance with the Rules in Schedule IV in no case exceeding rupees five hundred."

Along with this was added a new section—section 98-A which ran :

Section 98-A (1) : "Before the Council passes any resolution imposing a tax or duty for the first time it shall direct the Commissioner to publish a notice in the *Fort St. George Gazette* and in the

"Para. 3 (1) : For a period of two years from the commencement of Part III of the Indian Act, the provisions of sub-section (2) of section one hundred and forty-three of that Act (which authorises the continuance until provision to the contrary is made by the Federal Legislature, of certain Provincial taxes falling within the Federal List) shall have effect as if the reference to the first of January, nineteen hundred and thirty-five were a reference to the commencement of the said Part III."

It would follow, therefore, that for the present demand to be sustained as valid it would be sufficient if it was shown that the tax was lawfully levied immediately prior to the commencement of Part III of the Government of India Act, 1935 i.e., on 31st March, 1937. The learned Judges of the High Court held that this condition was satisfied and on this basis they have dismissed the appellant's petition.

Learned Counsel for the appellant submitted four points in support of the appeal: (1) That the Amending Act X of 1936 was not validly passed by reason of its contravening the Devolution Rules framed under section 45-A of the Government of India Act, 1919 by which Local Governments were given legislative power *inter alia* to levy taxes on professions, trades etc., but that the present tax which is really a "tax on income" was a Central subject outside the competence of the Local Legislature. (2) Even assuming that Act X of 1936 was valid, the tax which was permitted to be levied under it was, having regard to the terms of section 111 (1) a new tax which was levied for the first time by the resolution of the Corporation only on and from 1st April, 1937 and, therefore, the present tax was not in operation prior to the commencement of Part III of the Government of India Act, 1935, and not therefore saved by section 143 (2) of that Act. (3) Besides, between 1st April, 1937 to 1st April, 1942, it was not lawfully levied by reason of the lacuna created by the words of the Rules in Schedule IV being inapplicable to the levy of a tax on pensioners. (4) The increase in the rate from 1937 onwards could not be justified even under section 143 (2) or Article 277 and by reason of these changes in rates the tax became virtually a new tax and could not continue to be lawfully levied to any extent after the increases.

The first point need not detain us long. *Prima facie* it would seem that there being no rigid distribution of legislative power between the Central and Local Governments under the Government of India Act, 1919 any infraction of the rules made under the Devolution Rules framed under section 45-A would be validated by section 80-A (3) and section 84 (2) of the Government of India Act, 1919. The learned Judges of the High Court before whom this contention was urged rejected it and the learned Counsel submitted that the decision on this point was not correct. But in the view that we took of other submissions made to us, we did not hear learned counsel fully on this point and therefore do not propose to express any final opinion on the tenability of the argument on this head.

As preliminary to the consideration of the second point it would be necessary to advert to one feature of the change, effected by the Amending Act of 1936 to the tax levy. Under section 11, as it originally stood, the liability to pay the tax i.e., the charge for the tax, was imposed by virtue of the statute itself, on persons who for the period prescribed "exercised a profession or trade or calling or held an appointment", persons in receipt of pensions being deemed to be persons holding appointments. This structure as regards the imposition of liability was altered by the Amending Act. Under the provision, as recast before a liability to pay the tax could arise the Council had to determine by a resolution that profession tax shall be levied and it was only that resolution which brought the charge into operation. Thus, the resolution of the Council was substituted for the statute itself as the mode by which the charge was to be imposed. There was also a second change that was introduced by rendering residence for six months within the City, besides the receipt of pension in the City, a necessary ingredient of the chargeability of the "profession tax" on pensioners. The effect of these two changes now calls for consideration. On the amendment of section 111 by the Act of 1936 coming into force in April, 1936, the statutory imposition of the charge to tax laid on persons in receipt of pensions within the City of Madras ceased, and the liability to tax as regards the period after that date was dependent on the passing of a resolution by the Council in terms of the amended section 111 (1) of the Act. In this

connection it has to be pointed out that though recourse to the procedure as respects previous publication, etc. prescribed by section 98-A was necessary only in the case of taxes newly levied, and might have been adopted in the present case because of the enhancement of the rates, still, a resolution of the Council was necessary to impose the tax as without it, no liability to profession tax would arise. The charge to tax was imposed as stated earlier by the resolution of the Council which was to have effect from 1st April, 1937. In other words by reason of the repeal of the original section 111, the statutory charge to tax on pensioners ceased in April, 1936. A charge was imposed again under the resolution of the Council effective from 1st April, 1937, so that between April 1936 to 31st March, 1937, no charge was imposed by virtue of any "law." Learned Counsel for the Appellant submits that this is in effect a new levy—a levy of a tax which was not legally in existence on 31st March, 1937, and if this levy could not be supported as being sanctioned by section 143 of the Government of India Act, 1935, it is common ground that the lawfulness of the levy cannot be sustained. We consider this submission well founded. If the statutory charge to profession tax imposed on pensioners by the Act of 1919, was lifted by the Act of 1936, and the tax again came into operation only on 1st April, 1937, it would follow that there was no "levy of the tax" "immediately before" the commencement of Part III of the Government of India Act, 1935, so as to bring it within the saving in section 143 (2) of that Act. Besides, the two circumstances, *viz* : that residence within the city for a specified period was made a condition of the liability to the tax, as well as the increase in the rates would both serve to emphasise that the levy was a new one, with a different texture and not a continuance of the tax which was levied just prior to 1st April, 1937.

Learned Counsel for the respondent—the Corporation of Madras and the State have urged that it was in substance the old levy. We are unable to agree. The mere fact that prior to 1st April, 1937, the Corporation had under Act X of 1936 the power to bring the tax into force by a resolution does not on a proper construction of section 143 (2) bring it within the range of those taxes or duties which "were being lawfully levied" prior to the commencement of Part III of the Government of India Act which alone are permitted to be continued to be levied notwithstanding that these duties were in the Federal Legislative List. This question has been considered by us in great detail in *The Town Municipal Committee v. Ramachandra Vasudeo Chintoe and another, etc.*, in which judgment has been pronounced today and it is unnecessary to re-examine the same. The mere existence of a power to bring a tax into operation, cannot, as pointed out, be equated with "a tax which was being lawfully levied" before Part III of Government of India Act, 1935.

The third submission of learned Counsel for the appellant is also well-founded. The conclusion we have reached as to the effect of the amendment to section 111 by Act X of 1936, and of tax imposed by resolution of the Council from 1st April, 1937 not being a tax which was being lawfully levied immediately prior to 1st April, 1942, is reinforced by reference to the Rules in Schedule IV which remained unamended till 1942. Under section 111 (1) as amended, the tax could be levied only in accordance with the Rules in Schedule IV and as those rules did not make a provision for the levy of a tax on pensioners, it would follow that the tax "was not being lawfully levied" on them. As already pointed out, the relevant rules in that Schedule were framed at a time when *Explanation* (2) formed part of section 111 and "pensioners" were deemed to "hold appointments." With the deletion of the *Explanation*, the fiction created by the original Madras Act IV of 1919 ceased and thereafter if the Rules in Schedule IV had to be applied to them these had to be suitably modified. This, as we have pointed out earlier, was done only from 1st April, 1942, so that in reality taxes on pensioners were "lawfully" levied up to 1936 and then after a break from 1st April, 1942 we use the word "lawfully" on the assumption that this could have been legally done under the Government of India Act, 1935, a point already discussed. The learned Judges of the High Court have rejected the argument addressed to them under this head by reference to section 18 of the Madras General Clauses Act corresponding to section 24 of the General Clauses Act (Central Act X of 1897).

With great respect to the learned Judges we do not see how this provision affords any assistance in the matter. The Schedule and the Rules continued without repeal or amendment when the new section 111 (1) was substituted in 1936, and when this section made a reference to the Rules in Schedule IV it could only be a reference to the Rules in the Schedule IV which stood unaltered. If the phraseology employed in the Schedule was inappropriate to a class which was within section 111 (1), the only effect would be that the tax could not be levied, because of the defect in the law imposing the tax but such a situation is not remedied by reference to the provision in the General Clauses Act on which the learned Judges have relied.

If, therefore, the tax was one not lawfully levied just prior to 1st April, 1937 and was one brought after the Government of India Act, 1935 came into force and really only from 1st April, 1942 assuming this to be lawful it is obvious that the validity of tax could not be sustained as a continuation of a lawful pre-existing levy under section 143 (2).

In this view it is not necessary to consider the last of the points urged by learned Counsel and examine whether in case of an increase of rate, the entire tax would become a new tax and so unconstitutional or whether it is only the increase in the rate that would become unenforceable.

Learned Counsel for the respondent-Corporation submitted that the tax could not be deemed to be a tax on income, as was suggested by the appellant, but was really a tax on employment because it was in consideration of past services during employment that pension was payable. This argument was admittedly not urged before the learned Judges of the High Court and is obviously untenable. The taxes specified in Entry 60 are taxes on the carrying on of a profession, trade, etc., and would therefore apply only to a case of present employment. The mere fact that a person has previously been in a profession or carried on a trade, etc., cannot justify a tax under this entry. The tax on the receipt of pension or on the income from investments which is referred to in the last part of section 111 (1) is in truth and substance a tax on income and in fact the argument before the High Court proceeded on this basis, so have the learned Judges. At the time the tax is levied the pensioner is in no employment but is only in receipt of income though it might be for past services in an employment.

He next submitted that Act X of 1936 which had been enacted prior to the Government of India Act, 1935 was continued as an existing law by section 292 of the Government of India Act and as there was nothing in the Government of India Act against its continuance it would have effect even if the terms of section 143 (2) were not satisfied by the present levy. The learned Judges of the High Court accepted this submission. In our opinion, they were in error. The question of the correlation between Article 372 corresponding to section 292 of the Government of India Act and Article 277 corresponding to section 143 (2) of the Government of India Act was considered by this Court in *South India Corporation (P.) Ltd. v. The Secretary, Board of Revenue, Trivandrum*¹, and this Court said :

"It is settled law that a special provision should be given effect to the extent of its scope leaving the general provision to control cases where the special provision does not apply. The earlier discussion makes it abundantly clear that the Constitution gives a separate treatment to the subject of finances, and Article 277 saves the existing taxes etc. levied by States, if the conditions mentioned therein are complied with. While Article 372 saves all pre-Constitution valid laws, Article 277 is confined only to taxes, duties, cesses or fees lawfully levied immediately before the Constitution. Therefore, Article 372 cannot be construed in such a way as to enlarge the scope of the saving of taxes, duties, cesses or fees. To state it differently, Article 372 must be read subject to Article 277."

Learned Counsel next drew our attention to section 142-A (1) of the Government of India Act, 1935 and faintly suggested that it might afford him some assistance. This provision again was not adverted to before the learned Judges of the High Court and for a proper reason. Section 142-A (1) which corresponds to Article 276 (1) of the Constitution enacted :

"Notwithstanding anything in section one hundred of this Act, no provincial law relating to taxes for the benefit of Province or of a municipality, district board, local board or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income."

This section would assist the respondent only if tax imposed were one on a profession trade, calling, or employment and in that event the section provides that such a tax shall not be deemed to be a tax on income, but where the tax imposed is one not on a profession etc., at all, it does not mean that the State might levy a tax on income and call it profession tax. This is sufficient to dispose of a similar argument as regards the scope of the amended Entry 46 in the Provincial Legislative List (List II) to which we have adverted earlier.

The appeal accordingly succeeds and the appellant is held entitled to the relief prayed by him in the petition he filed in the High Court, *viz.*, a writ of Prohibition against the respondent-Corporation from enforcing the demand. The appellant will be entitled to his costs from the respondents here and in the High Court.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, A. K. SARKAR AND K. N. WANCHOO, JJ.

The Management of U. B. Dutt & Co. (Private), Ltd.

Appellant.

v.

The Workmen of U.B. Dutt & Co. (Private), Ltd. represented by the President, Kozhikode Taluk Earcha Mill Thozhilali Union, Kozhikode

Respondents.

Industrial Disputes Act (XIV of 1947)—Termination of employment on notice and wages under the Standing Orders—Termination subject only to the adjudication by the Industrial Tribunal—Action can be justified by evidence before the Tribunal.

Under Rule 18 (a) of the Standing Orders the employer can dispense with the service of any employee at any time by just giving 14 days notice or paying 12 days wages.

If the employer wanted to take action for misconduct and then suddenly dropped the departmental proceedings which were intended to be held and decided to discharge the employee under rule 18 (a) of the Standing Orders, it was clearly a colourable exercise of the power under that rule inasmuch as that rule was used to get rid of an employee instead of following the course of holding an enquiry for misconduct, notice for which had been given to the employee and for which a departmental inquiry was intended to be held. The employer could defend the action under rule 18 (a) by leading evidence before the Tribunal to show that there was in fact misconduct and therefore the action taken under rule 18 (a) was *bona fide* and was not colourable exercise of the power under that rule.

An employer cannot press his right purely on contract and say that under the contract he has unfettered right "to hire and fire" his employees. That right is now subject to industrial adjudication and even a power like that granted by rule 18 (a) of the Standing Orders in this case, is subject to the scrutiny of Industrial Courts. The Industrial Court has the right to enquire into the causes that might have led to termination of service even under a rule like rule 18 (a) and if it is satisfied that the action taken under such a rule was a colourable exercise of power and was not *bona fide* or was a result of victimisation or unfair labour practice it would have jurisdiction to intervene and set aside such termination.

Appeal by Special Leave from the Award dated the 10th March, 1959, of the Industrial Tribunal, Kozhikode, in I.D.No. 89 of 1958.

A. V. Viswanatha Sastri, Senior Advocate (*T. V. R. Tatachari*, Advocate with him); for Appellant.

Janardan Sharma, Advocate, for Respondents.

The Judgment of the Court was delivered by

Wanchoo, J.—This is an appeal by Special Leave in an industrial matter. The brief facts necessary for present purposes are these. The appellant is a saw-mill carrying on business in Kozhikode in the State of Kerala. One Sankaran was in the employ of the appellant as a cross-cutter. It is said that on 21st June, 1958 Sankaran came drunk to the mill and abused the Engineer, the Secretary and others and threatened them with physical violence. He was caught hold of by other work-

men and taken outside. It is said that he came again a short time later at 4-30 P.M. and abused the same persons again. Thereupon the appellant served a charge-sheet on Sankaran on 24th June, 1958 setting out the above facts and asked him to show cause why his services should not be terminated on account of his grave indiscipline and misconduct. Sankaran gave an explanation the same day denying the allegations of fact made against him, though he admitted that he had come to the mill at the relevant time for taking his wages for that week. On 25th June, 1958 Sankaran was informed that in view of his denial, a departmental inquiry would be held and he was also placed under suspension pending inquiry. The same day Sankaran protested against his suspension and requested that in any case the departmental inquiry should be expedited. As no inquiry was held till 2nd July, 1958, Sankaran again wrote to the appellant to hold the inquiry as early as possible. On 8th July, 1958, the appellant terminated the services of Sankaran under rule 18 (a) of the Standing Orders without holding any departmental inquiry and the order was communicated to Sankaran the same day. In the order the appellant informed Sankaran that the proposed inquiry, if conducted, would lead to further friction and deterioration in the rank and file of the employees in general and also that maintenance of discipline in the undertaking would be prejudiced if he was retained in the service of the appellant, and therefore it considered that no inquiry should be held. A dispute was then raised by the union which was referred to the Industrial Tribunal for adjudication by the Government of Kerala in October, 1958. The Tribunal held that something seemed to have happened on the afternoon of 21st June, 1958, but there was no evidence to prove what had actually happened. It further held that the appellant had intended to take disciplinary action against the workman but subsequently departmental proceedings were dropped and action was taken under rule 18 (a) of the Standing Orders. The Tribunal was of the view that this was a colourable exercise of the power given under rule 18 (a) to the appellant and therefore its action could not be upheld as a *bona fide* exercise of the power conferred. The Tribunal also pointed out that no attempt was made before it to defend the action taken under rule 18 (a) by proving the alleged misconduct. Two witnesses were produced before the Tribunal in connection with the alleged misconduct, but the Tribunal did not rely on them on the ground that the important witnesses, namely, the Engineer, the Secretary and other members of the staff whose evidence would have been of more value had not been produced and no explanation had been given why they were not produced. The Tribunal therefore held that on the facts it could not come to the conclusion that Sankaran had come drunk to the mill and abused or attempted to assault either the Engineer or the Secretary or other officers. In the result the order of discharge was set aside and Sankaran was ordered to be reinstated. The appellant thereupon applied for Special Leave which was granted; and that is how the matter has come up before us.

The main contention of the appellant is that it is entitled under rule 18 (a) of the Standing Orders to dispense with the service of any employee after complying with its terms. Rule 18 (a) is in these terms :—

“When the management desires to determine the services of any permanent workman receiving 12 as. or more as daily wages, otherwise than under rule 21, he shall be given 14 days notice or be paid 12 days wages”.

It may be mentioned that rule 21 deals with cases of misconduct and provides for dismissal or suspension for misconduct and in such a case the workman so suspended is not entitled to any wages during the period of suspension. The claim thus put forward on behalf of the appellant is that it is entitled under rule 18 (a) of the Standing Orders which is a term of contract between the appellant and its employees to dispense with the service of any employee at any time by just giving 14 days notice or paying 12 days wages.

We are of opinion that this claim of the appellant cannot be accepted, and it is too late in the day for an employer to raise such a claim for it amounts to claim “to hire and fire” an employee as the employer pleases and thus completely negates security of service which has been secured to industrial employees through

industrial adjudication for over a long period of time now. As far back as 1952, the Labour Appellate Tribunal had occasion to consider this matter relating to discharge by notice or in lieu thereof by payment of wages for a certain period without assigning any reason : (see *Buckingham and Carnatic Co., Ltd. etc. v. Workers of the Company, etc.*)¹. It was of opinion that even in a case of this kind the requirement of *bona fides* is essential and if the termination of service is a colourable exercise of the power or as a result of victimisation or unfair labour practice the Industrial Tribunal would have the jurisdiction to intervene and set aside such termination. Further it held that where the termination of service is capricious, arbitrary or unnecessarily harsh on the part of the employer judged by normal standards of a reasonable man that may be cogent evidence of victimisation or unfair labour practice. These observations of the Labour Appellate Tribunal were approved by this Court in *The Chartered Bank, Bombay v. The Chartered Bank Employees' Union*², and *Assam Oil Company v. Its Workmen*³. Therefore if as in this case the employer wanted to take action for misconduct and then suddenly dropped the departmental proceedings which were intended to be held and decided to discharge the employee under rule 18 (a) of the Standing Orders, it was clearly a colourable exercise of the power under that rule inasmuch as that rule was used to get rid of an employee instead of following the course of holding an inquiry for misconduct, notice for which had been given to the employee and for which a departmental inquiry was intended to be held. The reason given by the appellant in the order terminating the services of Sankaran of 8th July, 1958, namely, that the proposed inquiry, if conducted, would lead to further friction and deterioration in the rank and file of the employees in general and also that maintenance of discipline in the undertaking would be prejudiced if Sankaran were retained in service, cannot be accepted at its face value, so that the necessity for an inquiry intended to be held for misconduct actually charged might be done away with. In any case even if the inquiry was not held by the appellant and action was taken under rule 18 (a) it is now well settled, in view of the decisions cited above, that the employer could defend the action under rule 18 (a) by leading evidence before the Tribunal to show that there was in fact misconduct and therefore the action taken under rule 18 (a) was *bona fide* and was not colourable exercise of the power under that rule. But the Tribunal has pointed out that the employer did not attempt to do so before it. It satisfied itself by producing two witnesses but withholding the important witnesses on this question. In the circumstances, if the Tribunal did not accept the evidence of the two witnesses who were produced it cannot be said to have gone wrong.

Learned Counsel for the appellant however urges that the employer was empowered to take action under rule 18 (a) of the Standing Orders and having taken action under that rule, there was nothing for it to justify before the Tribunal. We have already said that this position cannot be accepted in industrial adjudication relating to termination of service of an employee and has not been accepted by Industrial Tribunals over a long course of years now and the view taken by Industrial Tribunals has been upheld by this Court in the two cases referred to above. Learned Counsel for the appellant, however, relies on the decision of this Court in *Parshotam Lal Dhingra v. Union of India*⁴. That was however a case of a public servant and the considerations that apply to such a case are in our opinion entirely different. Stress was laid by the learned Counsel on the observations at page 862 where it was observed as follows :—

“It is true that the misconduct, negligence, inefficiency or other disqualification may be the motive or inducing factor which influences the Government to take action under the terms of the contract of employment or the specific service rule, nevertheless, if a right exists, under the contract or the rules, to terminate the service, the motive operating on the mind of the Government is, as Chagla, C.J., has said in *Srinivas Ganesh v. Union of India*⁵, wholly irrelevant.”

It is urged, that the same principle should be applied to industrial adjudication. It is enough to say that the position of Government Servants stands on an entirely

1. (1952) L.A.C. 490.

2. (1961) 1 S.C.J. 70 : (1960) 3 S.C.R. 441.

3. (1961) 1 S.C.J. 137 : (1960) 3 S.C.R. 457.

4. (1958) S.C.J. 217 : (1958) S.C.R. 828.

5. A.I.R. 1956 Bom. 455.

different footing as compared to industrial employees. Articles 310 and 311 of the Constitution apply to Government Servants and it is in the light of these Articles read with the Rules framed under Article 309 that questions relating to termination of service of Government Servants have to be considered. No such constitutional provisions have to be considered when one is dealing with industrial employees. Further an employer cannot now press his right purely on contract and say that under the contract he has unfettered right "to hire and fire" his employees. That right is now subject to industrial adjudication and even a power like that granted by rule 18 (a) of the Standing Orders in this case, is subject to the scrutiny of Industrial Courts in the manner indicated above. The appellant therefore cannot rest its case merely on rule 18 (a) and say that having acted under that rule there is nothing more to be said and that the Industrial Court cannot inquire into the causes that led to the termination of service under rule 18 (a). The Industrial Court in our opinion has the right to inquire into the causes that might have led to termination of service even under a rule like 18 (a) and if it is satisfied that the action taken under such a rule was a colourable exercise of power and was not *bona fide* or was a result of victimisation or unfair labour practice it would have jurisdiction to intervene and set aside such termination. In this case the Tribunal held that the exercise of powers was colourable and it cannot be said that that view is incorrect. The appellant failed to satisfy the Tribunal when the matter came before it for adjudication that the exercise of the power in this case was *bona fide* and was not colourable. It could have easily done so by producing satisfactory evidence; but it seems to have rested upon its right that no such justification was required and therefore having failed to justify its action must suffer the consequences.

Learned Counsel for the appellant also drew our attention to another decision of this Court in *The Patna Electric Supply Co., Ltd., Patna v. Bali Rai and another*¹. That case in our opinion has no application to the facts of this case because that case dealt with an application under section 33 of the Industrial Disputes Act while the present proceedings are under section 10 of the Act and the considerations which apply under section 33 are different in many respects from those which apply to an adjudication under section 10.

The appeal therefore fails and is hereby dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, K. N. WANCHOO AND J. C. SHAH, JJ.

Ramesh

*Appellant**

v.

The State of Maharashtra

Respondent.

Penal Code (XLV of 1860), section 366-A—Gist of offence under—Person assisting prostitute to ply her profession—If guilty—Abetment—"Seduce"—Meaning.

A person who merely accompanies a woman going out to ply her profession of a prostitute, even if she has not attained the age of eighteen years, does not thereby commit an offence under section 366-A of the Indian Penal Code. It cannot be said that thereby he induces her to go from any place or to do any act with the intent or knowledge contemplated by the section. Where a woman follows the profession of a prostitute and in following that profession she is encouraged or assisted by someone no offence under section 366-A is committed by such person, for it cannot be said that the person who assists a girl accustomed to indulge in promiscuous intercourse for money in carrying on her profession, acts with intent or knowledge that she will be forced or seduced to illicit intercourse.

Seduction implies surrender of her body by a woman who is otherwise reluctant or unwilling to submit herself to illicit intercourse in consequence of persuasion, flattery, blandishment or importunity whether such surrender is for the first time or is preceded by similar surrender on earlier occasions.

Emperor v. Baijnath, (1932) I.L.R. 54 All. 756, *Shaheb Ali v. Emperor*, (1933) I.L.R. 60 Cal. 1457, *Aswini Kumar Roy v. The State*, A.I.R. 1955 Cal. 100 and *Nura v. Emperor*, A.I.R. 1934 Lah. 227, not approved.

1. (1958) S.C.J. 416 : (1958) M.L.J. (Cr.) 385 : (1958) S.C.R. 871.

* Cr. A. No. 72 of 1961.

But where a woman offers herself for intercourse for money—not casually but in the course of her profession as a prostitute—there are no scruples nor reluctance to be overcome, and surrender by her is not seduction within the Code. It will be impossible to hold that a person who instigates another to assist a woman following the profession of prostitute abets him to do an act with intent that she may or with knowledge that she will be seduced to illicit intercourse.

Appeal by Special Leave from the Judgment and Order dated 20th December, 1960, of the Bombay High Court in Criminal Appeal No. 1207 of 1960.

Jai Gopal Sethi, Senior Advocate (*G. L. Sareen* and *R. L. Kohli*, Advocates, with him), for Appellant.

G. C. Mathur and *P. D. Menon*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—On 1st May, 1962, we ordered after arguments were concluded that the appeal be allowed and the conviction of the appellant be set aside. We now proceed to record our reasons in support of the order.

The appellant Ramesh Amin and seven others were tried in the Court of Session, Aurangabad, for offences punishable under sections 366, 366-A, Indian Penal Code and abetment thereof. The appellant was the third accused at the trial. The Sessions Judge convicted accused Nos. 1 to 4 and 7 of the offences charged against them and sentenced them to suffer rigorous imprisonment for two years for each offence, and acquitted the rest. The High Court of Bombay entertained appeal of accused Nos. 1 to 4 (but not of accused No. 7) and set aside the order of conviction and sentence against them for the offences punishable under section 366 read with section 34 and section 366-A of the Indian Penal Code. The High Court, however, convicted the appellant of abetting the seventh accused in inducing a minor girl Anusaya to go with other persons from her residence at Kabadipura to Gulzar Theatre, and then to a house known as Bohori Kathada with intent that she may or knowing that she was likely to be seduced to illicit intercourse. With Special Leave the appellant has appealed to this Court.

The seventh accused Patilba is a resident of Aurangabad and the eighth accused is his wife. Anusaya is the daughter of Shakuntala by her husband Kashinath. After the death of Kashinath, Shakuntala brought her infant daughter Anusaya to the house of Patilba and started living with him as his mistress. Sometime later Shakuntala left the house of Patilba and took up residence at Nasik, but Anusaya continued to live with Patilba and was brought up by him. Marriage was arranged by Patilba between Anusaya and one Ramlal, but Anusaya declined to live with her husband. Patilba introduced Anusaya to some "customers" and she started indulging in promiscuous intercourse, for money. It was the prosecution case that on 13th January, 1960, the appellant went to the residence of Patilba and asked him to bring Anusaya and one Chandrakala (a woman following the profession of a prostitute) to the Gulzar Theatre, and accordingly, Patilba, the eighth accused, Chandrakala and Anusaya went to the Theatre. At the instance of the appellant, Anusaya and Chandrakala were taken by one Devidas (who has given evidence as an approver) to Bohori Kathada. Sub-Inspector Pagare of the Police Station City Police Chowk, Aurangabad had received information that some persons were consuming illicit liquor in a room at Bohori Kathada and he arranged to raid that house. Pagare found accused Nos. 1 to 5 and Devidas in a room consuming liquor. He also found Chandrakala and Anusaya in an inner apartment. Persons found in the room were arrested and sent for medical examination to the local Civil Hospital, and it was found that Anusaya had not attained the age of 18 years. Pagare then laid an information before the Judicial Magistrate, Aurangabad for offences punishable under the Bombay Prohibition Act, 1949—(we are informed at the Bar that in respect of those offences the accused were acquitted and we are not concerned in this case with those offences)—and also for offences punishable under sections 366 and 366-A of the Indian Penal Code against nine persons including the appellant, Patilba and Devidas. In the course of proceedings for commitment to the Court of Session, Devidas was tendered pardon on condition of his making a full disclosure

of the circumstances within his knowledge. The case was then committed to the Court of Session, Aurangabad for trial. The Court of Session held that accused Nos. 1 to 4 had in furtherance of their common intention kidnapped Anusaya—a girl below the age of 18 years—in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she would be forced or seduced to illicit intercourse, and the seventh accused Patilba had abetted the commission of that offence, and that accused Nos. 1 to 4 and 7 had induced Anusaya to go from her residence to the Gulzar Theatre and from the theatre to Bohori Kathada with intent that she may be or knowing that it was likely that she would be forced or seduced to illicit intercourse. He accordingly convicted accused Nos. 1 to 4 of the offence under section 366 read with section 34 of the Indian Penal Code and also of the offence under section 366-A of the Indian Penal Code.

The High Court of Bombay in appeal acquitted accused Nos. 1 to 4 of the offence of kidnapping because, in their view, accused Nos. 1 to 4 had

“nothing whatever to do with the original kidnapping by Patilba (the 7th accused) and since he was not the lawful guardian of this girl, her being brought to this room cannot be regarded as kidnapping”.

The learned Judges also acquitted accused Nos. 1 to 4 of the offence under section 366-A observing that

“there is no evidence of any direct talk between any of the accused and the girl, nor even of any inducement offered through Patilba (accused No. 7). Even so far as accused No. 3 is concerned, there is no direct talk between Anusaya and accused No. 3 which can be regarded as an inducement to her to move either from the house of Patilba or from the theatre to the room in question.”

But in their view the case against the appellant “did not end with this”: they observed :

“The evidence.....clearly indicates that accused No. 3 instigated Patilba and Devidas to bring the girl to the theatre and thereafter to the room in question. Patilba, as we have stated, being in custody of this girl and the girl being minor and helpless, induced or forced her to go to the cinema and thereafter to this room and actually left her there. So far as Patilba was concerned, he intended that she should be forced or seduced to illicit intercourse by one or the other of the accused. Accused No. 3 by asking Patilba to bring the girl to the theatre and asking Devidas and Patilba to bring the girl to the room clearly instigated Patilba in the commission of this offence. He must, therefore, be held clearly guilty of the offence of abetment of this offence by Patilba.”

The High Court accordingly convicted the appellant of the offence under section 366-A read with section 109 of the Indian Penal Code, because, in their view, he had abetted the commission of an offence punishable under section 366-A by Patilba by instigating the latter to bring Anusaya to the theatre and by further instigating Patilba and Devidas to bring Anusaya from the theatre to Bohori Kathada.

In our view, the appellant cannot in law be held guilty of abetting the commission of an offence punishable under section 366-A, Indian Penal Code by Patilba.

The facts proved by the evidence are these : Anusaya at the material time had not attained the age of 18 years. She was brought up by Patilba and even though she had married Ramlal she was at the material time and for many months before living under the guardianship of Patilba. For a long time before the date of the offence Anusaya was accustomed to indulge in promiscuous intercourse with “customers” for money. She used to entertain, as she herself admitted, “one or two customers every day” and had before the date of the offence been habituated to the life of a prostitute. On the day in question she and her companion Chandrakala went to the Gulzar Theatre accompanied by Patilba. In the theatre Anusaya and Chandrakala were seeking customers : they repaired during the break in the show to the entrance of the theatre for that purpose, but she had to return disappointed because they found a police van parked near the entrance. Anusaya and the 6th accused went to Bohori Kathada for carrying on their profession as prostitutes. There is no evidence that she was not willing to go to Gulzar Theatre on the night in question nor is there any evidence that she was unwilling to go to Bohori Kathada to which she and her companion were invited for the purpose of prostitution.

Do these facts make out a case against the appellant of abetment of the offence of procurement of a minor girl punishable under section 366-A of the Indian Penal Code? Section 366-A was enacted by Act XX of 1923 to give effect to certain Articles of the International Convention for the Suppression of Traffic in Women and Children signed by various Nations at Paris on 4th May, 1910. There are three principal ingredients of the offence :

- (a) that a minor girl below the age of 18 years is induced by the accused,
- (b) that she is induced to go from any place or to do any act, and
- (c) that she is so induced with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person.

The evidence clearly establishes that Anusaya had not at the material time attained the age of 18 years. But there is no evidence on the record that Patilba induced Anusaya to go to the theatre or from the theatre to Bohori Kathada. It must be assumed that when Patilba accompanied Anusaya to the theatre and from the theatre to the Bohori Kathada at the suggestion of the appellant he knew that she was going for plying her profession as a prostitute. But in our judgment a person who merely accompanies a woman going out to ply her profession of a prostitute, even if she has not attained the age of eighteen years, does not thereby commit an offence under section 366-A of the Indian Penal Code. It cannot be said that thereby he induces her to go from any place or to do any act with the intent or knowledge contemplated by the section.

We agree that seduction to illicit intercourse contemplated by the section does not mean merely straying from the path of virtue by a female for the first time. The verb 'seduce' is used in two senses. It is used in its ordinary and narrow sense as inducing, a woman to stray from the path of virtue for the first time; it is also used in the wider sense of inducing a woman to submit to illicit intercourse at any time or on any occasion. It is in the latter sense that the expression has been used in section 366 and 366-A of the Indian Penal Code which sections partially overlap. This view has been taken in a large number of cases by the Superior Courts in India, e.g. *Pratulakumar Basu v. The Emperor*¹, *Emperor v. Lasman Bala Kawala*², *Krishna Maharana v. The King Emperor*³, *In re Khalandar Saheb*⁴, *Suppiah v. Emperor*⁵, *Perumal v. Emperor*⁶, *King Emperor v. Nga Ni Ta*⁷, and *Karlara v. The State*⁸. The view expressed to the contrary in *Emperor v. Baijnath*⁹, *Shabeb Ali v. Emperor*¹⁰, *Aswini Kumar Roy v. The State*¹¹, and *Nura v. Emperor*¹² that the phrase used in section 366 of the Indian Penal Code is "properly applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl since the first act" is having regard to the object of the Legislature unduly restrictive of the content of the expression "seduce" used in the Code. But this is not a case in which a girl who had strayed from the path of virtue when she was in the custody of her guardian and had with a view to carry on her affair accompanied her seducer or another person. Such a case may certainly fall within the terms of section 366 or section 366-A whichever applies. But where a woman follows the profession of a prostitute, that is, she is accustomed to offer herself promiscuously for money to "customers", and in following that profession she is encouraged or assisted by someone, no offence under section 366-A is committed by such person, for it cannot be said that the person who assists a girl accustomed to indulge in promiscuous intercourse for money in carrying on her profession acts with intent or knowledge that she will be forced or seduced to illicit intercourse. Intention on the part of Patilba or knowledge that Anusaya will be forced to subject herself to illicit intercourse is ruled out by the evidence: such a case was not even suggested. Seduction implies surrender of

1. (1929) I.L.R. 57 Cal. 1074.
 2. (1934) I.L.R. 59 Bom. 652.
 3. (1929) I.L.R. 9 Pat. 647.
 4. A.I.R. (1955) A.P. 59.
 5. A.I.R. (1930) Mad. 980.
 6. (1924) 27 Cr.L.J. 1292.

7. (1904) 10 Burma L.R. 199.
 8. I.L.R. (1957) Punj 2003.
 9. (1932) I.L.R. 54 All. 756.
 10. (1933) I.L.R. 60 Cal. 1457.
 11. A.I.R. (1955) Cal. 100.
 12. A.I.R. (1934) Lah. 227.

her body by a woman who is otherwise reluctant or unwilling to submit herself to illicit intercourse in consequence of persuasion, flattery, blandishment or importunity, whether such surrender is for the first time or is preceded by similar surrender on earlier occasions. But where a woman offers herself for intercourse for money—not casually but in the course of her profession as a prostitute—there are no scruples nor reluctance to be overcome, and surrender by her is not seduction within the Code. It would then be impossible to hold that a person who instigates another to assist a woman following the profession of a prostitute abets him to do an act with intent that she may or with knowledge that she will be seduced to illicit intercourse

K S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—A. K. SARKAR, M. Hidayatullah and J. C. SHAH, JJ.

The Commissioner of Income-tax, Punjab, Jammu and Kashmir
and Himachal Pradesh, Patiala

*Appellant**

v.

The Punjab Distilling Industries, Ltd., Khassa

Respondent.

Income-tax Act (XI of 1922), section 4—Income—Assessee, a distiller of liquor—Sale of liquor in bottles—Price of liquor, price of bottles, and further refundable charge for return of bottles, constituting consideration for sale—Refundable charge, assessable as trading receipt—Punjab Excise Act of 1914 and rule 40 (14) (f) as amended in 1948—Scope.

The assessee, a distiller of country liquor, sold the liquor in bottles to the whole-salers for a consideration consisting of the price of the liquor and the price of the bottles also, under a scheme called the buy-back scheme devised by the Government till 1945, when the assessee began to collect besides the above two sums, a further amount called empty bottles return security deposit. The entire sum collected in this account was refunded in full on return of 90% of the bottles covered by it. The Supreme Court had already held in the case of the assessee for the assessment years 1947-48 and 1948-49, that this additional sum forming part of the consideration was a trading receipt and assessable. In regard to the assessment years in question, while the Department held that this additional charge was assessable, the Tribunal and the High Court came to a contrary conclusion on the ground that the rule 40 (14) (f) framed under the Punjab Excise Act of 1914, and as amended in 1948, making it compulsory to return at least 90% of the bottles and allowing the distiller to levy a further charge for this, altered the legal position. The charges collected after 1948 on this account were held to be not taxable. On an appeal taken by the Department to the Supreme Court,

Held : The additional charge is assessable as a trading receipt and the amendment has no effect on this aspect. The trade consisted of sale of bottled liquor and the consideration for the sale was constituted by several amounts respectively called, the price of the liquor, the price of the bottles, and the additional charge. The splitting-up of the amounts into different accounts would not make the total any the less the consideration for the sale.

The High Court thought that the earlier judgment of the Supreme Court had been based on the following considerations. (1) the additional charge had been made without the sanction of the Government and by the assessee itself, (2) that it could not be security deposit for the return of the bottles for there was no right to their return and (3) that it was refundable under the contract of sale itself, and in the instant case as a result of the amended rule, those factors are not available.

The prior judgment was not based upon the three factors. Nothing turned upon the fact whether the charge was made with or without the sanction of the Government.

The contention in the prior case that the charges formed a security deposit had been advanced only for the purpose of showing that they were not a part of the trading transactions. The question was not really whether the charges were security deposits but whether they were part of the trading transactions or had been made at anterior stages. The Court held that they were part of the trading transactions and were not relatable to an anterior stage.

Even under the amended rule there is no right to the return of the bottles, and the only reason why the rules required the whole-saler to return the bottles to the distiller was to authorise the imposition of a term of the sale upon the breach of which, the charges for the bottles cease to be refundable.

The deposit was actually taken under the contract; it was nonetheless so though the contract was authorised by the amended rules. The prior judgment held the amount deposited was refundable under the terms of the contract constituting the trading transaction and was therefore, a trading receipt.

Appeals by Special Leave from the Judgment and Order dated 23rd March, 1961 of the Punjab High Court in Income-tax Reference No. 14 of 1960.

R. Ganapathi Iyer and *R. N. Sachithy*, Advocates, for Appellant (In all the Appeals).

S. T. Desai, Senior Advocate (*R. K. Gauba, B. P. Singh* and *Narmit Lal*, Advocates, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Sarkar, J.—We think that these appeals are covered by the judgment of this Court in *Punjab Distilling Industries, Ltd. v. Commissioner of Income-tax*¹ and the High Court was in error in its view that the *ratio decidendi* of that judgment was not applicable to them. The earlier case had arisen out of the assessment of the same assessee but it was concerned with the years 1947-48 and 1948-49 while the present appeals are concerned with the years 1946-47, 1949-50, 1950-51 and 1951-52. The accounting period of the assessee was from December 1, in one year to November 30 of the following year. In both the cases the assessments were for income-tax, excess profits tax and business profits tax. The point for consideration in respect of all these taxes was, however, the same.

A full statement of the facts will be found in the judgment in the earlier case and it is unnecessary to state them at length over again. The assessee who was a distiller and seller of bottled country liquor, started collecting from its customers from the year 1945 besides the price of the liquor and the bottles in which the liquor was sold, a further charge called "empty bottles return security deposit". This charge was made at a certain rate per bottle delivered depending on its size on the term that it would be refunded as and when the bottles were returned to the assessee and that the entire sum collected on this account in respect of any one transaction would be refunded in full on return of 90% of the bottles covered by it. The question is whether this charge is a trading receipt assessable to tax. In the earlier case this Court held it to be assessable. This Court then said (page 687),

"the trade consisted of sale of bottled liquor and the consideration for the sale was constituted by several amounts respectively called, the price of the liquor, the price of the bottles and the security deposit. Unless all these sums were paid the appellant would not have sold the liquor. So the amount which was called security deposit was actually a part of the consideration for the sale and, therefore, part of the price of what was sold."

In respect of the years now under consideration the Income-tax Officer taxed these charges and on appeal the Appellate Assistant Commissioner confirmed the Income-tax Officer's view. On further appeal, however, the Income-tax Tribunal reversed the decisions of the authorities below and held that these charges were loans and not trading receipts. It may be stated that all this had happened before the aforesaid earlier judgment was delivered. After the Tribunal's decision, the Commissioner of Income-tax obtained a reference of the following question to the Punjab High Court :

"Whether on the facts and circumstances of the case the collections by the assessee company described in its accounts as 'empty bottle return security deposits' were income assessable under section 10 of the Income-tax Act."

It is of interest to note that the earlier case also concerned an identical question and had been answered both by the High Court and this Court in the affirmative.

If the judgment in the earlier case covered the present appeals, then the question referred would, of course, have to be answered in the affirmative. The High Court, however, took the view that as a result of the amendment of the rule made under the Punjab Excise Act, 1914 which came into effect from April 1, 1948, the charges collected after that date were not covered by that judgment. It held that the amended rule made the *ratio decidendi* of our judgment inapplicable to the charges collected after that date. The rule referred to is rule 40 (14) (f) and the relevant part of it on which the High Court based its view is as follows :—

(v) It is compulsory for the licensee to return at least 90% of the bottles issued to him by the licensed distiller.

(vi) The licensed distiller may, at the time of issue, demand security at the rates of three rupees, two rupees or one rupee and eight annas per dozen quart, pint or nip bottles respectively up to 10 per cent. of the bottles issued by him and confiscate the security to the extent falling short of the 90 per cent. limit.

The licensee referred to in the earlier of the rules quoted is the wholesaler to whom the distiller sold his liquor. It is not very clear what is meant by the words "up to 10 per cent. of the bottles issued" or the words "falling short of the 90 per cent. limit". It is not necessary, however, to pursue this matter for we shall not be concerned with the precise meaning of these words. It is not in dispute that some charge described as a deposit was realised on the term that it would be refunded in certain eventualities and that is enough for our purpose for the only question is whether this charge was a trading receipt.

The High Court thought that the earlier judgment of this Court had been based on three considerations, namely, (1) that the charge concerned had been made without Government's sanction and entirely as a condition imposed by the assessee itself for the sale of its liquor; (2) that it could not be security deposit for the return of the bottles for there was no right to their return and (3) that it was refundable under the contract of sale itself. In the High Court's view if these circumstances were not there, our decision would have been different. The High Court held that since the amended rules came into force, none of these considerations was available and, therefore, the charges could not be held to be trading receipts. The following quotation from the judgment of the High Court fairly summarises its reasoning:

"The amended rules were given effect from 1st April, 1948. The securities were demanded in accordance with the above rules. The three considerations which prevailed with their Lordships of the Supreme Court and which have been mentioned above will not apply to the instant case. It cannot, therefore, be said, as was the case in the appeal before their Lordships of the Supreme Court, that the 'additional amounts had been taken without Government's sanction and entirely as a condition imposed by the appellant itself for the sale of its liquor'. Again it cannot be said that the 'wholesalers were under no obligation to return the bottles'. Lastly, in view of the statutory rule amended in 1948 it cannot be said that the deposit 'was part of each trading transaction and was refundable under the terms of the contract relating to trading transaction under which it had been made.'"

It is not in dispute that if the High Court was in error in this reasoning, the present case will be governed by the earlier decision.

With respect to the learned Judges of the High Court, we think that the earlier judgment of this Court has been misunderstood by them. That judgment had not been based on the three points mentioned by the High Court and this we now proceed to show. The first point of distinction between the two cases was based on the observation in the earlier case that the "additional amounts had been taken without Government's sanction and entirely as a condition imposed by the appellant itself for the sale of its liquor." The High Court apparently thought that by this observation it was suggested that if the amounts had been taken under Government's sanction, then they would not have been taxable. We are wholly unable to agree that this is a correct reading of that judgment. That observation contained only a recital of fact and was made for the purpose of distinguishing these amounts from the other amounts charged by the assessee as price of bottles to which we have earlier referred. The other amount was charged under a scheme framed by the Government and called the "buy back scheme". We find nothing in the earlier judgment to show that the conclusion there arrived at was based on the fact that the charge had not been made with the sanction of the Government. That nothing turned on whether a charge was made under a Government scheme or purely as a matter of contract would indeed appear to have always been the common case. Thus even before the amended rules had come into force, the assessee had been collecting under the afore-said "buy back scheme" which had the sanction of the Government, from its customers as price of the bottles, a charge which was refundable on the return of the bottles. The charge now under consideration is a charge additional to that collected under the "buy back scheme" and this we have earlier said. It has never been in dispute, either in the earlier case or now that the charge under the "buy back scheme" which was collected under Government's sanction constituted a taxable income. This Court had never said, nor was it ever contended by the assessee

that a collection would not be taxable if it had been made with the sanction of the Government. The first point of distinction sought to be made by the High Court is, therefore, unfounded.

The second point made by the High Court was that the observation in the earlier judgment that the charge could not be a security for the return of the bottles as there was no right to such return, was no longer applicable as under the amended rules there was a right to the return of the bottles. We do not agree for reasons to be stated later, that under the amended rules there was such a right but we will assume for the present that there was. Now, the argument in connection with which that observation was made was that if the charges were deposits for securing the return of the bottles, they were not trading receipts. By the aforesaid observation this Court dealt with the first part of this argument and said that the assumption that the charges were for securing the return of the bottles was unfounded for there was no right to such return. If the charges were not by way of security deposit the argument must, of course fail. So that was one answer that was given to the argument. But this Court did not stop there and proceed to consider the argument as a whole, namely, whether if the charges were security deposits, they were not trading receipts.

Now, the reason why it was said that if the charges were security deposits they were not trading receipts is to be found in two cases on which the argument was based. The first was the case of *Davies v. Shell Co. of China, Ltd.*¹. In that case the Company had delivered its product to certain agents for sale and payment of the sale proceeds to it. The Company took money from each agent as deposit to secure itself against the risk of default by him to account for the sale proceeds. It was observed by Jenkins, L.J.,

“Mr. Grant described the agents’ deposits as a part of the Company’s trading structure, not trade receipts but anterior to the stage of trade receipts, and I think that is a fair description of them. It seems to me that it would be an abuse of language to describe one of these agents after he had made a deposit, as a trade creditor of the Company in respect of the deposit not on account of any goods supplied or services rendered by him in the course of its trade, but simply by virtue of the fact that he has been appointed an agent of the Company with a view to his trading on its behalf, and as a condition of his appointment has deposited with or, in other words, lent to the Company the amount of his stipulated deposit.”

That was the kind of security deposit which Mr. Sastri appearing for the assessee on the earlier occasion said the “empty bottles return security deposits” were. The real point, therefore, in contending that the deposits were security deposits was to establish that they were not part of the trading transactions at all but related to a stage anterior to the trading transactions. This contention was rejected and it was held that the “empty bottles return security deposits” were not the kind of deposits considered in the *Shell Company case*¹.

The other case on which Mr. Sastri then relied was *K. M. S. Lakshmanier & Sons v. Commissioner of Income-tax and Excess Profits Tax, Madras*². That case dealt with three trade arrangements. Mr. Sastri contended that the “empty bottles return security deposits” were the kind of deposits dealt with in the third arrangement considered in that case but this argument also failed. Under the third arrangement, the trader took from its constituent at the commencement of an expected series of trading transactions with it a deposit and kept the same till the business connection came to an end whereupon the deposit was refundable to the constituent with interest at 3 per cent. per annum after deduction thereout of any amount remaining due from the constituent on the trading transactions. The understanding was that the constituent would pay for each purchase made by him from the trader during the continuance of the business connection and it was only where he failed to make the payment that the amount due became liable to be deducted from the deposit. This deposit was held by this Court to be a loan for these reasons :

“The amount deposited by a customer was no longer to have any relation to the price fixed for the goods to be delivered under a forward contract—either instalment or otherwise. Such price

1. (1951) 32 T.C. 133.

(1953) S.C.R. 1057.

2. (1953) 1 M.L.J. 609 : (1953) S.C.J. 222 :

was to be paid by the customer in full against delivery in respect of each contract.....It was only at the end of the 'business connection' with the appellants that an adjustment was to be made towards any possible liability arising out of the customer's default..... The transaction had thus all the essential elements of a contract of loan." (p. 1063).

None of these cases, therefore, was concerned with the question whether a security deposit was by its very nature such that it could not be a trading receipt. The first case dealt with an actual security deposit but it was held that that deposit was not a trading receipt not for the reason that it was a security deposit but for the reason that it formed the structure under which trading transactions producing trading receipts were conducted and was not itself connected with any trading transaction. In the second case, the receipt was held to be a loan; that it might be also a security deposit was not even mentioned. It was held not to be a trading receipt because it had no connection with the trading transactions but related to a stage anterior to the trading transaction.

It is, therefore, clear that the contention that the charges formed a security deposit had been advanced only for the purpose of showing that they were not a part of the trading transactions. The question was not really whether the charges were security deposits but whether they were part of the trading transactions or had been made at anterior stages. This Court decided that they were part of the trading transactions and were not relatable to an anterior stage. That is all that it was called upon to decide and did decide.

That on the earlier occasion this Court was not concerned with the question whether the charges made were security deposits or not would appear from the following observations occurring at page 690 :

"Mr. Sanyal was prepared to argue that even if the amounts were securities deposited for the return of the bottles, they would still be trading receipts, for they were part of the trading transactions and the return of the bottles was necessary to enable the appellant to carry on its trade, namely, to sell liquor in them. As we have held that the amounts had not been paid as security for the return of the bottles, we do not consider it necessary to pronounce upon this contention."

This Court, therefore, did not decide that if the deposits had been made to secure the return of the bottles, they could not be a trading receipt. The High Court was in error in distinguishing the present case from the earlier one on the basis that this Court had then so decided.

We now turn to the question whether under the amended rules there was any right in the distiller to the return of the bottles. We think there was not and in this respect the two cases are identical; in none was the charge in fact a security deposit. The reason for that view is this. The liquor passed through three sales before it reached the consumer; first the distiller sold it to a wholesaler then the wholesaler to a retailer and lastly, the retailer to the consumer. If the rules created an obligation on the wholesaler to return the bottles to the distiller, then the rules would provide for a return of the bottles to the wholesaler by the retailer and to the retailer by the consumer; without such rules it would be idle to require the wholesaler to return the bottles to the distiller. We have not been shown anything creating a right in the wholesaler or the retailer to a return of bottles. Clearly, the consumers were under no obligation to return the bottles in which they bought liquor. Sub-clause (v) of the rule on which the High Court based itself, referred to the return of the bottles in which liquor was sold. In the absence of a right in the wholesaler to a return of the bottles from the retailer it would be insensible to read that provision as creating an obligation on the wholesaler to return the bottles. He had no means under the rules to perform, that obligation. That rule, therefore, must be read as intending only to lay down that if the wholesaler could not return the bottles, his deposit was liable to be confiscated under sub-clause (vi). Again, the rules do not lay down any procedure by which the distiller might enforce the return of the bottles to him, which they would have undoubtedly done if it was intended to give him a right to the return of the bottles. Indeed there is nothing to show that he can obtain such a return. Whether the wholesaler would be liable to punishment under the Act for breach of his obligation to return the bottles or not is to no purpose, for we are now concerned with the right of the distiller to obtain a return of the bottles.

It seems to us that the only reason why the rules required a wholesaler to return the bottles to the distiller was to authorise the imposition of a term of the sale upon the breach of which, the charges made for the bottles would cease to be refundable.

We now come to the last point of distinction made by the High Court. On the earlier occasion this Court had said that the amount deposited was refundable under the terms of the contract constituting the trading transaction and was, therefore, a trading receipt. The learned Judges of the High Court seem to have been of the opinion that since the rule was amended, the deposits had to be made under it and, therefore, were not thereafter received under the contract or as part of the trading transaction constituted by it. With great respect to the learned Judges, there appears to be some confusion here. The rule by its own force does not compel a deposit to be made. The terms of the rule make this perfectly clear. All that it does is to empower a distiller to take a deposit. But the deposit must be taken under a contract made in regard to it; it is not taken under the rule itself. In other words, all that the rule does is to authorise the making of a contract concerning the deposit on the terms mentioned in it, the object apparently being to avoid any question as to its validity arising later. We may here point out that the trade in liquor is largely controlled by Government Regulations. It must, therefore, be held that the deposit was actually taken under a contract; it was nonetheless so though the contract was authorised by the statutory rules. The third point of distinction on which the High Court relied was, therefore, also without foundation. Whether if the deposits had been made without a contract and directly under the rules and in respect of a trading transaction made by a contract they would have been trading receipts or not, is not a question that arises in the present appeals and on that question we express no opinion now.

For these reasons we think that these appeals are completely governed by the earlier judgment of this Court and we answer the question referred in the affirmative. We should state that even according to the High Court the amounts collected as "empty bottles return security deposit" prior to 1st April, 1948, were chargeable to tax.

The appeals are allowed and the respondent will pay the costs here and below. There will be one set of costs allowed as hearing fee.

V, S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

J. Dalmia

*.. Appellant**

v.

The Commissioner of Income-tax, New Delhi

.. Respondent.

Indian Income-tax Act (XI of 1922), section 16 (2)—Dividend—Assessee, shareholder in company—Articles of Association empowering declaration of interim dividends by directors—Interim dividend declared, not paid within accounting year—Income, not assessable in respect of accounting year—Company—General meeting—Declaration of dividend—Enforceable obligation—Interim dividend—Declaration by directors—Not an enforceable obligation, but rescindable—Mere declaration in either case not payment.

The assessee was the registered holder of shares in the year of accounting ending with September 30, 1951, in a company registered under the Companies Act of the former Rampur State. Article 73 of the Articles of Association of the Company provided for the declaration of dividend by the company in general meeting and Article 74 provided for the declaration of an interim dividend by the directors of the company in their discretion. Pursuant to a resolution passed by the board of directors of the company at a meeting held on 30th August, 1950, the assessee received a dividend warrant dated 28th December, 1950, for Rs. 4,12,500 being the interim dividend in respect of the shares. This amount was brought to tax in the assessment year 1952-53 by the Revenue rejecting the objection of the assessee that it represented the income for the assessment year 1951-52. The High Court affirmed the orders and the assessee appealed to the Supreme Court,

Held : The dividend would be income assessable for the assessment year 1952-53.

A declaration by a company in general meeting gives rise to an enforceable obligation, but a resolution of the board of directors resolving to pay interim dividend or even resolving to declare interim dividend pursuant to the authority conferred upon them by the Articles of Association gives rise to no enforceable obligation against the company, because the resolution is always capable of being rescinded.

The departure in the text of Article 74 of the Articles of Association of the company from the statutory version under Table A of the power in respect of interim dividend makes no real difference in the true character of the right arising in favour of the members of the company on execution of the power.

Under section 16 (2) of the Act, the Legislature had not made dividend income taxable in the year in which it becomes due ; by express words, it is taxable only in the year in which it is paid, credited, or distributed or is deemed to be paid, credited or distributed.

A mere declaration of dividend in general meeting of the company cannot be regarded as payment within the meaning of section 16 (2).

It is true that the expression 'paid' in section 16 (2) does not contemplate actual receipt of the dividend by the member. In general, dividend may be said to be paid within the meaning of the section when the company discharges its liability and makes the amount of dividend unconditionally available to the member entitled thereto. The test, that because the dividend becomes due to the assessee who has the right to deal with it or dispose of the same in any manner he likes, it is taxable in the year in which it is declared, cannot be regarded as correct.

Much less can it be said that a resolution of the directors declaring interim dividend, which is capable of being rescinded by directors, would operate as payment, before the company has actually parted with the amount of dividend or discharged its obligation by some other act.

Appeal from the Judgment and Order dated 6th March, 1961 of the Punjab High Court (Circuit Bench) at Delhi in I.T. Ref. No. 16 of 1959.

S. K. Kapur, Senior Advocate (*B. P. Maheshwari*, Advocate, with him), for Appellant.

C. K. Daphtary, Attorney-General for India and *K. N. Rajagopal Sastri*, Senior Advocate (*R. N. Sachthey*, Advocate, with them), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The appellant which is a Hindu undivided family was the registered holder of 1,500 shares of M/s. Govan Bros. (Rampur), Ltd. in the year of account October 1, 1950 to September 30, 1951. Pursuant to a resolution passed by the board of directors of M/s. Govan Bros. (Rampur), Ltd.—hereinafter called 'Govan Bros.'—at a meeting held on August, 30, 1950, the appellant received a dividend warrant dated December 28, 1950 for Rs. 4,12,500 being interim dividend in respect of its share-holding in Govan Bros. This amount was brought to tax with the other income of the appellant in the assessment year 1952-53 by the Revenue authorities, after rejecting the objection of the appellant that it represented income for the assessment year 1951-52.

At the instance of the appellant the Appellate Tribunal drew up a Statement of the Case and referred the question set out herein below to the High Court of Punjab under section 66 (1) of the Indian Income-tax Act :

"Whether on a true interpretation of Article 95 of the First Schedule to the Indian Companies Act, 1913, the dividend of Rs. 4,12,500 was liable to be included in the assessment year 1952-53." The High Court recorded an answer to the question in the affirmative. Against the order of the High Court, this appeal is preferred by the appellant with certificate granted by the High Court.

Even though the question was framed as if Article 95 of the First Schedule to the Indian Companies Act, 1913, applies to Govan Bros., it is common ground that the company was registered under the Companies Act of the former Rampur State, and it had adopted special Articles of Association in supersession of Table A of the Companies Act. The relevant Articles of Govan Bros. dealing with declaration or payment of final and interim dividends were Articles 73 and 74. The High Court therefore proceeded to deal with the question on the footing that it was, by the question referred, called upon to interpret Article 74 of the Articles of Association of Govan Bros. It is common ground between the appellant and the Revenue that

the provisions of the Companies Act of the former Rampur State were in terms identical with the provisions of the Indian Companies Act, 1913.

The appellant contends that the directors of Govan Bros. had in exercise of authority expressly conferred upon them by Article 74 declared dividend in their meeting dated August 30, 1950 and on such declaration the dividend became a debt due to the appellant and under the Indian Income-tax Act it became taxable in the year of assessment 1951-52, for the previous year of the appellant had ended on September 30, 1950. The Commissioner of Income-tax says that the director of Govan Bros. had paid by warrant issued on December 28, 1950 pursuant to a resolution dated August 30, 1950, interim dividend and it was only on payment the dividend became taxable under section 16 (2) of the Indian Income-tax Act. It is said by the Commissioner that dividend final or interim is taxable not in the year in which it is declared but only in the year in which it is paid, credited or distributed, or deemed to be paid, credited or distributed, and that in any event a resolution by the Board of Directors to pay interim dividend does not create an enforceable obligation, for it is always open to the directors to rescind the resolution for payment of dividend even if it is one in form declaring dividend.

The Indian Companies Act, 1913 contains no provision for declaration of dividend either interim or final : it does not say as to who shall declare the dividend, nor does it say that dividend may be declared in a general meeting of the company. But section 17 (2) provides that the company may adopt all or any of the regulations contained in Table A in the First Schedule to the Companies Act as its Articles of Association, and shall in any event be deemed to contain regulations identical with or to the same effect, amongst others, as regulation 95 and regulation 97 contained in that Table. Regulation 95 of Table A provides that the company in general meeting may declare dividends, but no dividends shall exceed the amount recommended by the directors, and regulation 97 states that no dividends shall be paid otherwise than out of profits of the year or any other undistributed profits. Regulation 96, which is not an obligatory article, provides that the directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company. Govan Bros. had in their Articles of Association made the following provision with regard to dividends :

“Article 73.—The Company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits.

Article 74.—When in their opinion the profits of the company permit, the directors may declare an interim dividend.

Article 77.—No dividend shall be payable, except out of the net profits arising from the business of the company, and no larger dividends shall be declared than is recommended by the directors.”

By Article 80 it was provided that unless otherwise directed by the company in general meeting any dividends may be paid by cheque or warrant sent through the post to the registered address of the member entitled to the same. In Article 74 relating to payment of interim dividend, there was a slight departure from the regulation under Table A of the First Schedule to the Companies Act. Whereas under regulation 96, Table A the directors are authorised to *pay* to the members interim dividends, by Article 74 of the Articles of Association of Govan Bros. the directors are authorised to *declare* interim dividend. It may be noticed that under section 17, adoption of an article in form identical with, or to the same effect as regulation 96 of Table A, is not made obligatory.

The material part of section 16 (2) of the Income-tax Act as it stood before it was deleted by section 7 of the Finance Act, 1959 with effect from April 1, 1960, read as follows :

“For the purposes of inclusion in the total income of an assessee any dividend shall be deemed to be income of the previous year in which it is paid, credited or distributed or deemed to have been paid, credited or distributed to him * * *

The clause in terms made dividend the income of the year in which it was paid, credited or distributed or was deemed to have been paid, credited or distributed. In the

present case dividend was paid to the appellant on December 28, 1950. It is not the case of the appellant that the amount was either credited in the books of account of Govan Bros. to the appellant or was distributed or deemed to have been paid, credited or distributed to the appellant before the close of the appellant's year of account ending September 30, 1950. But Mr. Kapur contends that under the law governing companies on declaration, dividend interim or final becomes due, and it must be regarded for the purpose of the Income-tax Act as paid to the member on the date on which it is declared.

There is no doubt that a declaration of dividend by a company in general meeting gives rise to a debt. "When a company declares a dividend on its shares, a debt immediately becomes payable to each share-holder in respect of his dividend for which he can sue at law, and the Statute of Limitation immediately begins to run." : In *re Severn and Wye and Severn Bridge Railway Company*¹. But this rule applies only in case of dividend declared by the company in general meeting. A final dividend in general may be sanctioned at an annual meeting when the accounts are presented to the members. But power to pay interim dividend is usually vested by the Articles of Association in the directors. For paying interim dividend a resolution of the company is not required : if the directors are authorised by the Articles of Association they may pay such amount as they think proper, having regard to their estimate of the profits made by the company. Interim dividend is therefore paid pursuant to the resolution of the directors on some day between the ordinary general meetings of the company. On payment, undoubtedly interim dividend becomes the property of the share-holder. But a mere resolution of the directors resolving to pay a certain amount as interim dividend does not create a debt enforceable against the company, for it is always open to the directors to rescind the resolution before payment of the dividend. In *The Lagunas Nitrate Company (Limited) v. J. Henry Schroeder & Company*², the directors of a company passed a resolution declaring interim dividend payable on a future date, and requested the company's bankers to set apart, out of the money of the company in their hand, into a special account entitled "Interim Dividend Account", a sum sufficient to cover the dividend, pending the company's instructions. But before the date fixed for payment, the directors resolved that pending certain litigation to which the company was a party, payment of dividend be postponed. It was held by the Court that the directors had the right even after resolving to pay interim dividend to rescind the resolution and no enforceable right arose in favour of the members of the company by the declaration of interim dividend.

In Halsbury's Laws of England, III Edn., Vol. 6, p. 402, Article 778, it has been stated :

"A directors' declaration of an interim dividend may be rescinded before payment has been made."

Therefore a declaration by a company in general meeting gives rise to an enforceable obligation, but a resolution of the Board of Directors resolving to pay interim dividend or even resolving to declare interim dividend pursuant to the authority conferred upon them by the Articles of Association gives rise to no enforceable obligation against the company, because the resolution is always capable of being rescinded. Therefore departure in the text of Article 74 of the Articles of Association of Govan Bros. from the statutory version under Table A of the power in respect of interim dividend, which may be entrusted to the directors, makes no real difference in the true character of the right arising in favour of the members of the company on execution of the power. The directors by the Articles of Association are entrusted with the administration of the affairs of a company ; it is open to them if so authorised to declare interim dividend. They may, but are not bound to, pay interim dividend even if the finances of the company justify such payment. Even if the directors have resolved to pay interim dividend, they may before payment rescind the resolution.

Counsel for the appellant does not rely upon any evidence of actual payment or upon any credit given to the appellant in the books of account of the company

1. L.R. (1896) 1 Ch. 559.

2. 17 Times Law Reports 625.

nor upon any distribution. Even the resolution of the directors of August 30, 1950, is not on the record, and there is no evidence that it was resolved to pay the dividend on any date before it was actually paid, and the company had taken any step to implement the resolution within the year of account corresponding to the assessment year 1951-52. There is no statutory provision which gives rise to a fiction that on declaration of interim dividend, it should be deemed to be paid, credited or distributed.

In support of the plea that interim dividend was taxable in the year of assessment 1951-52, the appellant relies upon two facts only—the power vested in the directors to declare interim dividend, and the passing of a resolution by the directors relating to interim dividend on August 30, 1950 followed by the drawing of dividend warrants dated December 28, 1950. But for reasons already stated a resolution of the Board of Directors declaring interim dividend, until it is implemented by some step taken by the company, creates no enforceable right in the share-holders. The judgment of the Bombay High Court in *Commissioner of Income-tax, Bombay v. Laxmidas Mulraj Khatau*¹, on which counsel for the appellant relies does not assist him either. In that case the company declared a dividend out of its profits, and made it payable a few days later. The dividend was paid on the date on which it was made payable by the resolution of the company. The Income-tax Officer treated the amount received by the member as dividend income for the assessment year in which it was actually received. The High Court of Bombay in a reference under section 66 observed that as soon as the dividend was declared it became the income of the assessee which income the assessee could deal with or dispose of in any manner he liked. Chagla, C.J., speaking for the Court enunciated the law as follows :

“ It is impossible to give a literal construction to the expression ‘ paid ’ used in this sub-section (sub-section (2) of section 16). If a literal construction were to be given, then it would amount to this that until the dividend warrant was actually cashed and the dividend amount was actually realised it cannot be stated that the dividend was paid to the share-holder * * * We think the proper construction to give to that word is when the dividend is declared then a liability arises on the part of the company to make that payment to the share-holder and with regard to the share-holder when the income represented by that dividend accrues or arises to him. The mere fact that the actual payment of the income is deferred is immaterial and irrelevant.”

But whether dividend—interim or fixed—is income taxable in a particular year of assessment must be determined in the light of section 16 (2) of the Indian Income-tax Act. The Legislature had not made dividend income taxable in the year in which it becomes due : by express words of the statute, it is taxable only in the year in which it is paid, credited or distributed or is deemed to be paid, credited or distributed. The Legislature has made distinct provisions relating to the year in which different heads of income become taxable. Salary becomes taxable by section 7 when it is allowed to the employee or becomes due to him, whether it is actually paid to him or not. Interest on securities under section 8 is taxable when it is received by the assessee. Under section 9 tax on property becomes payable not on any actual receipt of income from the property but on a purely notional computation in the year of account of a *bona fide* annual value of the property, subject to the adjustments provided in that section. Profits and gains of business, profession or vocation carried on by an assessee are computed in accordance with the method of accounting regularly employed by the assessee, unless the Income-tax Officer being of the opinion that profits or gains cannot properly be deduced therefrom, directs otherwise. Other sources of income—and dividends are included in this residuary class—become taxable in the year in which they are received or accrue or arise or are deemed to be received, accrued or arisen according to the nature of the particular income. The year in which a particular class of income becomes taxable must therefore be determined, in the light of its true character, and subject to the special provision, if any, applicable thereto. The Legislature has enacted an express provision making dividend income taxable in the year in which it is paid, credited or distributed or is to be deemed, so paid, credited or distributed. The test applied by Chagla, C.J., that because the dividend becomes due to the assessee who has the right to deal with or

dispose of the same in any manner he likes, it is taxable in the year in which it is declared, cannot be regarded as correct. The expression "paid" in section 16 (2) it is true does not contemplate actual receipt of the dividend by the member. In general, dividend may be said to be paid within the meaning of section 16 (2) when the company discharges its liability and makes the amount of dividend unconditionally available to the member entitled thereto. Chagla, C.J., has himself in *Purshotamdas Thakurdas v. Commissioner of Income-tax, Bombay City*¹, expressed a different view. The learned Chief Justice in delivering the judgment of the Court referred to *Laxmidas Mulraj Khatau's case*², and observed that the principle of that case applied only to those cases where in fact the dividend was paid to the shareholder and not to cases where a contingent liability was undertaken and no payment was made. He observed :

"* * * * * one thing is clear from the language used by the Legislature that it did not intend to equate 'paid' with 'declared' in every case. Therefore, it is open to us to consider, notwithstanding the *Khatau Mills' case*², whether on the facts of this case, it could be said that dividend has been paid, which although it may have been declared may never be payable and in fact has not been paid."

If the mere declaration of dividend in general meeting of the company is not to be regarded as payment within the meaning of section 16 (2), much less can it be said that a resolution declaring interim dividend—which is capable of being rescinded by directors—operates as payment before the company has actually parted with the amount of dividend or discharged its obligation by some other act. The High Court was therefore right in recording an affirmative answer to the question propounded for the consideration of the Court.

The appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Banarsi Debi and another

.. *Appellants**

v.

The Income-tax Officer, District IV, Calcutta and others .. *Respondents.*

Income-tax Act (XI of 1922), section 34 (1) (a) as amended by Act (I of 1959)—Back assessment—Notice issued within eight years served after eight years—Amending Act validating notices issued after limitation—'Issued' means 'served'—Income-tax (Amendment) Act (I of 1959), section 4.

The assessment for the assessment year 1947-48 was completed in 1948 and no tax was found to be payable by the assessee. The Income-tax Officer then commenced proceedings under section 34 (1) (a) of the Income-tax Act on the ground of escaped assessment and the notice issued on 19th March, 1956 was served on the assessee on 2nd April, 1956 and that was clearly out of time. The High Court quashed the notice by allowing a petition filed by the assessee under Article 226 of the Constitution. Pending the appeal filed by the Department, the Amending Act (I of 1959) was enacted. The appeal was allowed and the petition filed by the assessee was dismissed on the ground that section 4 of the Amending Act validated the notice. The assessee appealed to the Supreme Court.

Held : Section 4 of the Amending Act would validate the notice issued before the lapse of eight years and served after the period. The expression 'issued' used in the section would mean 'served'.

The clear intention of the Legislature is to save the validity of the notice as well as the assessment from an attack on the ground that the notice was given beyond the prescribed period.

1. (1958) 34 I.T.R. 204 : I.L.R. (1958) Bom. 1172 : A.I.R. 1959 Bom. 303.

2. (1948) 16 I.T.R. 248 : 50 Bom.L.R. 360 : A.I.R. 1948 Bom. 404.

* C.As. Nos. 142 and 143 of 1963.

The intention would be effectuated by giving a wider meaning to the expression 'issued' namely, 'served'. The dictionary meaning of the expression 'issued' takes in the entire process of sending the notice as well as the service thereof. The said word used in section 34 (1) of the Act itself was interpreted by Courts to mean 'served'. The limited meaning, namely, 'sent' will exclude from the operation of the provision a class of cases and introduce anomalies.

A provision in a taxing statute creating a charge for the tax must be couched in express and unambiguous language. The provision laying down the machinery for assessment has to be construed by the ordinary rules of construction in accordance with the clear intention of the Legislature, which is to make a charge levied effective.

Section 4 of the Amending Act enacts a provision resuscitating barred claim and enables the Income-tax Officer to reassess escaped income. The stringent rules of construction appropriate to charging section shall apply to the section.

Appeals by Special Leave from the Judgment and Order dated 13th July, 1961 of the Calcutta High Court in Appeals from Original Orders Nos. 41 and 69 of 1959.

S. Chaudhuri, Senior Advocate (*K. R. Chaudhuri*, Advocate, with him), for Appellants (In C.A. No. 142 of 1963).

M. Rajagopalan, *K. Rajendra Chowdhary* and *K. R. Chaudhuri*, Advocates, for Appellants (In C.A. No. 143 of 1963).

K. N. Rajagopal Sastri, Senior Advocate (*R. N. Sachthey*, Advocate, with him), for Respondents (In both the Appeals).

The Judgment of the Court was delivered by

Subba Rao, J.—These two appeals filed by Special Leave raise the question of the true construction of the provisions of section 4 of the Indian Income-tax (Amendment) Act, 1959 (Act 1 of 1959), hereinafter called the Amending Act. The material facts lie in a small compass and they are as follows. For the assessment year 1947-48 the appellant in Civil Appeal No. 142 of 1963 filed a return of her income before the Income-tax Officer, District IV, Calcutta, and the assessment was completed sometime in 1948 as a result whereof it was found that no tax was payable by her. On April 2, 1956, the Income-tax Officer served on her a notice dated March 19, 1956, under section 34 (1) of the Indian Income-tax Act, 1922, hereinafter called the Act, on the ground of escaped assessment. The date of the notice fell within 8 years from the end of the relevant assessment year, i.e., March 31, 1948; but it was served beyond 8 years from that date and, therefore, was clearly out of time under the provisions of the said section.

In Civil Appeal No. 143 of 1963, for the assessment year 1947-48 the appellant was assessed on a total income of Rs. 28,993 on December 30, 1948, by the Income-tax Officer and the tax thereon amounting to Rs. 4,747-13-0 was deposited on behalf of the appellant in the Reserve Bank of India. On April 2, 1956, the appellant was served with a notice dated March 19, 1956, by the Income-tax Officer purporting to be under section 34 of the Act on the ground of escaped assessment. The date of the notice fell within 8 years from the end of the relevant assessment year, i.e., March 31, 1956; but it was served beyond 8 years from that date and was, therefore, clearly out of time under the provisions of the said section.

The appellants in the two appeals filed two petitions in the High Court of Calcutta under Article 226 of the Constitution for quashing the said notices and for other appropriate reliefs. On March 20, 1957, *Sinha, J.*, of that Court issued rules *nisi* on the said two applications to the Income-tax Officer, the Commissioner of Income-tax and the Union of India. On September 11, 1958 the said Judge made the rules absolute. The respondents to the applications preferred appeals from the judgment of *Sinha, J.*, to a Division Bench of that Court. Pending the appeals, on March 12, 1959, section 34 of the Act was amended by section 2 of the Amending Act. After the said amendment the appeals were heard by a Division Bench of the High Court, consisting of *Bose, C.J.*, and *G. K. Mitter, J.* Relying upon the said amendment the learned Judges held that the said notices, though served on the appellants after the prescribed time, were saved under section 4 of the Amending Act. In view they set aside the orders of *Sinha, J.*, and dismissed the Writ Petition the appeals.

Learned Counsel for the appellants contends that the notices under section 34 (1) of the Act were served on the appellants beyond 8 years from the end of the assessment year and, therefore, were barred and that on a true construction of the provisions of section 4 of the Amending Act, the said notices were not saved thereunder. To appreciate the contention it is necessary to read the relevant provisions of the Act, before and after the amendment.

Section 34 (1) of the Indian Income-tax Act, 1922, before it was amended by the Finance Act (XVIII of 1956) :

If—

(a) The Income-tax Officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return of his income under section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for the year, income, profit or gain chargeable to income-tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate or have been made the subject of excessive relief under the Act or excessive loss or depreciation allowance has been computed, or

(b) he may in cases falling under clause (a) at any time within eight years, serve on the assessee, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22 and may proceed to assess or re-assess such income, profits or gains or re-compute the loss or depreciation allowance ; and the provisions of this Act shall, so far as may be apply accordingly as if the notice were a notice issued under that sub-section

* * * * *

Provided that where a notice under sub-section (1) has been issued within the time therein limited, the assessment or re-assessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if such period exceeds the period of eight years or four years, as the case may be.

Section 4 of the Amending Act (Act I of 1959) :

No notice issued under clause (a) of sub-section (1) of section 34 of the principal Act at any time before the commencement of this Act and no assessment, re-assessment or settlement made or other proceedings taken in consequence of such notice shall be called in question in any Court, tribunal or other authority merely on the ground that at the time the notice was issued or at the time the assessment or re-assessment was made, the time within which such notice should have been issued or the assessment or re-assessment should have been made under that section as in force before its amendment by clause (a) of section 18 of the Finance Act, 1956, had expired.

Section 34 (1) (a) of the Act empowered the Income-tax Officer to assess concealed income which escaped assessment by serving a notice on the assessee at any time within 8 years of the end of the assessment year in respect whereof the said income has escaped assessment. Section 4 of the Amending Act debars the Court from questioning the validity of a notice issued or the assessment or re-assessment made under sub-section (1) (a) of section 34 of the Act on the ground that the time for the issue of such notice or the making of such assessment or re-assessment had expired under the said sub-section before it was amended by section 18 of the Finance Act of 1956.

Learned Counsel for the appellants contends that section 4 of the Amending Act only saves a notice issued after the prescribed time, but does not apply to a situation where notice is issued within but served out of time. Learned Counsel for the respondents argues that the expression "issued" means "served" and that, in any view, it is comprehensive enough to take in the entire process of giving and serving of notice.

Before construing the section it will be useful to notice the relevant rules of construction of a fiscal statute. In *Oriental Bank v. Wright*¹, the Judicial Committee held that if a statute professed to impose a charge, the intention to impose a charge on the subject must be shown by clear and unambiguous language. In *Canadian Eagle Oil Co. v. R.*², Viscount Simon, L.C., observed :

"In the words of Rowlatt, J., in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

In other words, a taxing statute must be couched in express and unambiguous language. The same rule of construction has been accepted by this Court in *Gurshai Saigal v. Commissioner of Income-tax, Punjab*¹, wherein it was stated :

"It is well recognised that the rule of construction that if a case is not covered within the four corners of the provisions of a taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the Legislature and by considering what was the substance of the matter applies only to a taxing provision and has no application to all provisions in a taxing statute. It does not apply to a provision not creating charge for the tax but laying down the machinery for its calculation or procedure for its collection. The provisions in a taxing statute dealing with machinery for assessment have to be construed by the ordinary rules of construction, that is to say, in accordance with the clear intention of the Legislature, which is to make a charge levied effective."

In that case, the Court was called upon to construe the provisions of section 18-A of the Income-tax Act, 1922, which laid down the machinery for assessing the amount of interest, and therefore, this Court did not apply the stringent rule of construction. Apart from the emphasis on the letter of the law, the fundamental rule of construction of a taxing statute is not different from that of any other statute and that rule is stated by Lord Russell of Killowen, C.J., in *Attorney-General v. Calton Bank*², thus :

"The duty of the Court is to give effect to the intention of the Legislature, as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed."

To the present case the general rule of construction of fiscal Acts would apply, and not the exception engrafted on that rule ; for section 4 of the Amending Act cannot be described as a provision laying down the machinery for the calculation of tax. In substance it enables the Income-tax Officer to re-assess a person's income which has escaped assessment, though the time within which he could have so assessed had expired under the Act before the amendment of 1959. It resuscitates barred claim. Therefore the same stringent rules of construction appropriate to a charging section shall also apply to such a provision.

Before the Amending Act of 1959 was passed Income-tax Officers issued notices before 1st April, 1956, and also after that date for re-opening assessments made beyond 8 years from the issue of such notices. The validity of such notices was questioned. To save the validity of such notices the Amending Act was passed. This Court in *S. C. Prashar v. Vasantsen Dwarkadas*³, held on a construction of section 4 of the Amending Act that it operated and validated the notices issued under section 34 (1) (a) of the Act as amended in 1948, even earlier than 1st April, 1956. In other words, notices issued under section 34 (1) (a) of the Act before or after 1st April, 1956 could not be challenged on the ground that they were issued beyond the time-limit of 8 years from the respective assessment years prescribed by the 1948 Amendment Act. Section 4 of the Amending Act of 1959, therefore, was enacted for the sole purpose of saving the validity of such notices in respect of all escaped incomes relating to any year commencing from the year ending on 31st March, 1941, though they were issued beyond the prescribed time. If the construction sought to be placed by the learned Counsel for the appellants be accepted, it would defeat the purpose of the amendment in some cases. If the words were clear and exclude the class of cases where the notices were sent before 8 years from the date of assessment, but served thereafter, this Court has to give them the said meaning.

This brings us to the question of construction of the provisions of section 4 of the Amending Act. The crucial word in the said section is "issued". The section says that though a notice was issued beyond the time within which such notice should have been issued, its validity could not be questioned. If the word "issued" means "sent", we find that there is no provision in the Act prescribing a time-limit for sending a notice, for, under section 34 (1) (a) of the Act a notice could be served only within 8 years from the relevant assessment year. It does not provide any period

1. (1963) 1 S.C.J. 149 : A.I.R. 1963 S.C. 1062. 3. (1963) 1 S.C.J. 687 : (1963) 1 I.T.J. 519 : A.I.R. (1963) S.C. 1356.

2. L.R. (1899) 2 Q.B. 158, 164.

for sending of the notice. Obviously, therefore, the expression "issued" is not used in the narrow sense of "sent". Further, the said expression has received, before the amendment, a clear judicial interpretation. Under section 34 (1) (a) of the Act the Income-tax Officer may in cases falling under clause (a) at any time within 8 years serve on the assessee a notice. The Proviso to that section says that where the notice under section 34 (1) (a) is within time therein limited, the assessment or re-assessment to be made in pursuance of such notice may be made before the expiry of one year from the date of the service of the notice even if such period exceeds the period of 8 years or 4 years, as the case may be. In *Commissioner of Income-tax, Bombay South v. D. V. Ghurye*¹, it was argued that a notice sent before 8 years though served beyond 8 years was in compliance with the section; and in support of that argument the expression "issued" in the Proviso was relied upon to limit the meaning of the word "served" in the substantive part of the section. Rejecting the argument, Chagla, C.J., speaking for the Court, observed :

"In other words, the attempt is to equate the expression "served" used in section 34 with the expression "issued" used in the Proviso to sub-section (3). Now we must frankly confess that we find it difficult to understand why the Legislature has used in the Proviso the expression "where a notice under sub-section (1) has been issued within the time therein limited". In sub-section (1) no time is limited for the issue of the notice : time is only limited for the service of the notice ; and therefore it is more appropriate that the expression "issued" used in the Proviso to sub-section (3) should be equated with the expression "served" rather than that the expression "served" used in sub-section (1) should be equated with the expression "issued" used in the Proviso to sub-section (3)."

This decision equated the expression "issued" with expression "served". The Allahabad High Court in *Sri Niwas v. Income-tax Officer*², has also interpreted the word "issued" to mean "served". The relevant rule of construction is clearly stated by Viscount Buckmaster in *Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd.*³ thus :

"It has long been a well-established principle to be applied in the consideration of Act of Parliament that where a word of doubtful meaning has received a clear judicial interpretation the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

Section 4 of the Amending Act was enacted for saving the validity of notices issued under section 34 (1) of the Act. When that section used a word interpreted by Courts in the context of such notices it would be reasonable to assume that the expression was designedly used in the same sense. That apart, the expressions "issued" and "served" are used as inter-changeable terms both in Dictionaries and in other statutes. The dictionary meaning of the word "issue" is "the act of sending out, put into circulation, delivery with authority or delivery". Section 27 of the General Clauses Act (Act X of 1897) reads thus :

"Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression "serve" or either of the expressions, "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

It would be seen from this provision that Parliament used the words "serve", "give" and "send" as inter-changeable words. So too, in sections 553, 554 and 555 of the Calcutta Municipal Act, 1951, the two expressions "issued to" or "served upon" are used as equivalent expressions. In the legislative practice of our country the said two expressions are sometimes used to convey the same idea. In other words, the expression "issued" is used in a limited as well as in a wider sense. We must, therefore, give the expression "issued," in section 4 of the Amending Act that meaning which carries out the intention of the Legislature in preference to that which defeats it. By doing so we will not be departing from the accepted meaning of the

1. I.L.R. (1957) Bom. 377 : 59 Bom. L.R. 2. (1956) A.L.J. 616 : A.I.R. 1956 All. 657.
433 : A.I.R. 1958 Bom. 139.

3. L.R. (1933) A.C. 402, 411.

expression, but only giving it one of its meanings accepted, which fits into the context or setting in which it appears.

With this background let us give a closer look to the provisions of section 4 of the Amending Act. The object of the section is to save the validity of a notice issued beyond the prescribed time. Though the time within which such notice should have been issued under section 34 (1) of the Act, as it stood before its amendment by section 18 of the Finance Act of 1956, had expired, the said notice would be valid. Under section 34 (1) of the Act, as we have already pointed out, the time prescribed was only for service of the notice. As the notice mentioned in section 4 of the Amending Act is linked with the time prescribed under the Act, the section becomes unworkable if the narrow meaning is given to the expression "issued". On the other hand, if we give wider meaning to the word, the section would be consistent with the provisions of section 34 (1) of the Act. Moreover, the narrow meaning would introduce anomalies in the section: while the notice, assessment or re-assessment were saved, the intermediate stage of service would be avoided. To put it in other words, if the proceedings were only at the stage of issue of notice, the notice could not be questioned, but if it was served, it could be questioned; though it was served beyond time, if the assessment was completed, its validity could not be questioned. The result would be that the validity of an assessment proceeding would depend upon the stage at which the assessee seeks to question it. That could not have been the intention of the Legislature. All these anomalies would disappear if the expression was given the wider meaning.

To summarize: The clear intention of the Legislature is to save the validity of the notice as well as the assessment from an attack on the ground that the notice was given beyond the prescribed period. That intention would be effectuated if the wider meaning is given to the expression "issued". The dictionary meaning of the expression "issued" takes in the entire process of sending the notice as well as the service thereof. The said word used in section 34 (1) of the Act itself was interpreted by Courts to mean "served". The limited meaning, namely, "sent" will exclude from the operation of the provision a class of cases and introduce anomalies. In the circumstances, by interpretation, we accept the wider meaning the word "issued" bears. In this view, though the notices were served beyond the prescribed time, they were saved under section 4 of Amending Act. No other point was raised before us.

In the result, the appeals fail and are dismissed with costs. There will be one hearing fee.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, K. N. WANCHOO AND J. C. SHAH, JJ.
Bhagwanbhai Dulabhai Jadhav and another .. *Appellants**

v.

The State of Maharashtra

.. *Respondent.*

Criminal Procedure Code (V of 1898), section 417—Appeal against acquittal—Burden of proof—Section 103 of the Code—If applicable to search of motor car suspected to carry prohibited liquor.

Bombay Prohibition Act (XXV of 1949), sections 83, 81 and 66 (b)—Applicability.

The burden lies on the prosecution, and the presumption of innocence of the accused till the contrary is proved applies with equal, if not greater, force in an appeal to the High Court against an order of acquittal. In dealing with an appeal against an order of acquittal the High Court is entrusted with power to review evidence and to arrive at its own conclusion on the evidence. Where the trial court has ignored the broad features of the prosecution case, and restricted itself to a consideration of minor discrepancies in acquitting the accused, the High Court can disturb the finding.

A motor car is not a "place" within the meaning of sections 102 and 103 of the Code of Criminal Procedure, and a motor car cannot be so regarded for purposes of a search. In making a search of a

motor vehicle, it was not obligatory upon the Police Officer to comply with the requirements thereof. Even though the statute does not make it obligatory, the Police Officers wisely carry out the search, if it is possible for them to secure the presence of respectable witnesses in, their presence. This is a healthy practice which leads to cleaner investigation and is a guarantee against the oft-repeated charge against Police Officers of planting articles.

An inference of conspiracy to commit or cause to be committed any offence under the Bombay Prohibition Act (an offence punishable under section 83 of the Act) cannot be made from the facts proved in the case, *viz.*, that the five accused were found in a motor car which contained in its luggage compartment a number of foreign liquor bottles and some of the accused were blood relations. Conviction under section 83 is therefore not warranted. If two of the accused are proved to have committed the substantive offence punishable under section 66 (b) of the Act it is difficult to appreciate how they can also be convicted of abetting the commission of that offence under section 81 of the Act.

Appeal by Special Leave from the Judgment and Order dated the 16th August, 1960, of the Bombay High Court in Criminal Appeal No. 225 of 1959.

B. B. Tawakley, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him), for Appellants.

M. S. K. Sastri and *P. D. Menon*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Shah, J.—With Special Leave, the two appellants *Bhagwanbhai Dulabai Jadhav* and *Haribhai Maganbhai Bhandare*—hereinafter referred to as accused Nos. 1 and 5 respectively—have appealed against the order passed by the High Court of Judicature at Bombay setting aside the order of the Judicial Magistrate, First Class, Thana, acquitting them and three others of offences punishable under sections 65 (a), 66 (b), 81 and 83 of the Bombay Prohibition Act XXV of 1949—hereinafter called the Act.

The case of the prosecution may briefly be stated: On 25th August, 1957, a "wireless message" alerting the officers posted on "watch duty" at Kasheli Naka, District Thana that a motor car bearing No. BMY 1068 belonging to the first appellant was carrying "contraband goods", was received. This motor car reached the Kasheli Naka at about 2-30 P.M. on 28th August. The first accused was then driving the car, the second accused was sitting by his side and accused 3 to 5 were sitting in the rear seats. Panchas were called by the Sub-Inspector of Police Deshpande from a village nearby and in their presence the vehicle was searched and from the luggage compartment (which was opened with the key found on search on the person of the 5th accused), 43 sealed bottles of foreign liquor and a large number of packets of tobacco were found. A search list was prepared and the five occupants of the vehicle were arrested. The vehicle and the articles found therein were attached. The vehicle was handed over to the Central Excise Authorities together with the ignition key and the key of the luggage compartment for taking proceedings in respect of packets of tobacco which were attached. A charge-sheet was then filed in the Court of the Judicial Magistrate, First Class, Thana, against the five accused charging them with offences punishable under sections 65 (a), 66 (b), 81 and 83 of the Act. The accused pleaded not guilty to the charge: they stated that the case was "false and entirely got up", that no "liquor or other contraband" was found in the motor car and "the whole plot was engineered by the enemies of the 1st accused". They denied that the motor car was searched in their presence. The fifth accused denied that the key of the luggage compartment was found on his person. The trial Magistrate held that the prosecution evidence was insufficient to establish that the persons accused before him were acting in conspiracy or were abetting each other in transporting contraband articles in the car and acquitted them.

Against the order of acquittal, the State of Bombay appealed to the High Court of Bombay. The High Court observed that the trial Court treated the case as "a mathematical problem", and examined the evidence giving undue importance to minor discrepancies. In the view of the High Court the evidence established that in consequence of information received from Police Station Vapi, motor car No. BMY 1068 was stopped at 2-30 P.M. on 28th August, 1957, near Kasheli Naka,

that at that time the 1st accused was driving the motor car which belonged to him, that accused No. 2 was sitting near him and accused Nos. 3 to 5 were sitting in the rear seats, that the key of the luggage compartment was found on the person of the 5th accused, that on opening that compartment in the presence of the Panchas, 43 bottles of foreign liquor and a large number of packets of tobacco were found, and that the evidence warranted the conviction of all the accused for offences punishable under sections 65 (a), 66 (b), 81 and 83 of the Bombay Prohibition Act. The High Court accordingly allowed the appeal against accused Nos. 1, 2 and 5 of all the offences and directed each of them to undergo rigorous imprisonment for one year and pay a fine of Rs. 500 for each of the offences, and in default of payment of fine to rigorous imprisonment for 3 months in respect of each offence, and directed that the substantive sentences do run concurrently. The appeal against accused Nos. 3 and 4 was dismissed because they could not be served with the notice of appeal.

The High Court was undoubtedly dealing with an appeal against an order of acquittal, but the Code of Criminal Procedure placed no special limitation upon the powers of the High Court in dealing with an appeal against an order of acquittal. The High Court is entrusted with power to review evidence and to arrive at its own conclusion on the evidence. There are certainly restrictions inherent in the exercise of the power, but those restrictions arise from the nature of the jurisdiction which the High Court exercises. In a criminal trial the burden always lies on the prosecution to establish the case against the accused and the accused is presumed to be innocent of the offence charged till the contrary is established. The burden lies upon the prosecution and the presumption of innocence applies with equal, if not greater, force in an appeal to the High Court against an order of acquittal. In applying the presumption of innocence the High Court is undoubtedly slow to disturb findings based on appreciation of oral evidence for the Court which has the opportunity of seeing the witnesses is always in a better position to evaluate their evidence than the Court which merely peruses the record. In the present case, the High Court, in our judgment, was right in holding that the trial Court ignored the broad features of the prosecution case, and restricted itself to a consideration of minor discrepancies. The Magistrate meticulously juxtaposed the evidence of different witnesses on disputed points and discarded the evidence in its entirety when discrepancies were found. That method was rightly criticised by High Court as fallacious. The Magistrate had to consider whether there was any reliable evidence on questions which had to be established by the prosecution. Undoubtedly in considering whether the evidence was reliable he would be justified in directing his attention to other evidence which contradicted or was inconsistent with the evidence relied upon by the prosecution. But to discard all evidence because there were discrepancies without any attempt at evaluation of the inherent quality of the evidence was unwarranted.

Sub-Inspector Deshpande spoke about the "wireless message" received at the Kasheli Naka, about the arrival of the motor car of the first accused at 2-30 in the afternoon of 28th August, 1957, about the search of the car in the presence of the Panchas and the discovery of 43 bottles of foreign liquor and packets of tobacco in the luggage compartment of the motor car. Nothing was elicited in the cross-examination which threw any doubt upon the truth of the story, and no adequate reason was suggested why he should be willing falsely to involve the accused in the commission of a serious offence by fabricating false evidence. He was corroborated by the contents of the "Panchnama", which was a written record contemporaneously made about the search, and the evidence of the Panch witness Pandu Kamliya. Deshpande was also partially supported by Head-Constable Ghodabrey. The latter witness deposed that the motor car driven by the 1st accused was stopped at Kasheli Naka and Panchas were called, but according to him, search was made before the Panchas arrived and the bottles were taken out of the luggage compartment and placed near the car. We agree with the view of the High Court that the evidence of Head Constable Ghodabrey though somewhat inconsistent with the evidence of Sub-Inspector Deshpande and the Panch witness, accorded with their story that the liquor bottles were in the motor car when it was stopped near the

Kasheli Naka on the day in question. That evidence by itself is sufficient to establish that the accused possessed the bottles of foreign liquor.

It was urged, however, that under the law making of a search in the presence of independent witnesses of the locality called for that purpose was obligatory, and as according to the evidence of Head Constable Ghodabrey and Panch witness Laxman Ganpat the search was held without complying with the formalities prescribed by section 103 of the Criminal Procedure Code, the Panchnama about the search of the motor car and the evidence of the finding of the articles therein must be discarded and the rest of the evidence was not sufficient to displace the presumption of innocence which by the order of acquittal was reinforced. We are unable to agree with this contention. Section 117 of the Act provides,

"Save as otherwise expressly provided in this Act, all investigations, arrests, detentions in custody and searches shall be made in accordance with the provisions of the Criminal Procedure Code, 1898: provided that no search shall be deemed to be illegal by reason only of the fact that witnesses for the search were not inhabitants of the locality in which the place searched is situated".

In view of that provision it is obligatory upon a Police Officer about to make a search to call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search. But a motor car is not a 'place' within the meaning of sections 102 and 103 of the Code of Criminal Procedure; nor is there anything in the Act by which a motor car would be so regarded for purposes of a search. The provisions relating to searches contained in section 103 of the Code of Criminal Procedure have therefore no application and in making a search of a motor vehicle, it was not obligatory upon the Police Officer to comply with the requirements thereof. This is not, however, to say that the practice which is generally followed by Police Officers when investigating offences under the Act to keep respectable persons present on the occasion of the search of a suspected person or of a vehicle may be discarded. Even though the statute does not make it obligatory, the Police Officers wisely carry out the search, if it is possible for them to secure the presence of respectable witnesses, in their presence. This is a healthy practice which leads to cleaner investigation and is a guarantee against the oft-repeated charge against Police Officers of planting articles.

It was strenuously urged by Counsel for the appellants that the High Court did not attach sufficient importance to a piece of evidence which strongly militated against the truth of the prosecution case. This piece of evidence, it was contended, related to the ignition key and the luggage compartment key, produced at the trial. As we have already observed, the motor car together with ignition key and luggage compartment key which were attached were handed over to the Excise Authorities for investigating the case in respect of tobacco which was attached with liquor. The motor car and the keys were produced by the Excise Authorities at the instance of the accused before the Magistrate. An attempt was made to open the luggage compartment of the motor car by using one of the keys and the trial Magistrate recorded his observations in that behalf. He has stated that the keys were produced by the Sub-Inspector of Central Excise and "with the white key the lock of the carrier was tried for thirty minutes. Oil was allowed to be put. Even then the lock was not opened. The yellow key was then tried on the petrol tank and was opened immediately." It appears, however, from the evidence of Inspector Jambekar that the "white key was the ignition key and the yellow was the key of the luggage compartment." It is true that Head Constable Ghodabrey says, that the "white key" was the key of the luggage compartment and with that key the first accused had opened the luggage compartment. But we fail to appreciate why no attempt was made by the trial Magistrate to ascertain whether the yellow key could be used for opening the luggage compartment and whether the white key fitted the ignition switch. In view of this infirmity it is difficult to hold that the story of the finding of the key and the attachment of liquor after opening the luggage compartment of the motor car was untrue.

The case tried by the trial Magistrate was simple. There is no dispute that the Police Officers had attached 43 bottles of foreign liquor at the Kasheli Naka on the day in question. It was the case of the accused that these bottles of liquor

were not in their possession and Sub-Inspector Deshpande made a false Panchnama showing that these bottles were found in the luggage compartment of the motor car belonging to the first accused. The primary question which the trial Magistrate had to consider was about the credibility of the prosecution evidence in the light of the defence set up by the accused. The bottles of foreign liquor attached by the Police exceeded Rs. 2,000 in value; the trial Magistrate had to consider whether it was reasonably possible that the Police Officers could procure the bottles to falsely involve the accused, or having attached them from some other person, allow that person to escape and plant them in the motor car of the accused and then make a false Panchnama. No attempt appears to have been made to examine the evidence in the light of the defence set up or suggested. It was urged that one Inspector Mane of Police Station Bhilad was an enemy of the 1st accused. But that does not explain the conduct of Sub-Inspector Deshpande. It would indeed be difficult for Deshpande to secure this large quantity of foreign liquor, and even if it could be secured no rational ground is suggested why Deshpande would keep it with him on the possible chance of the first accused arriving at the Kasheli Naka. The High Court has on a consideration of the evidence of Sub-Inspector Deshpande, the Panch witness Pandu Kamaliya and Head Constable Ghodabrey come to the conclusion that the accused Nos. 1, 2 and 5 were guilty of possessing liquor in contravention of the provisions of the Act, and in our view the High Court was right in so holding.

But the order of conviction passed by the High Court and the sentence imposed are not according to law. Section 65 of the Act penalises a person who in contravention of the provisions of the Act, or of any rule, regulation or order made or of any licence, pass, permit or authorization thereunder—(a) imports or exports any intoxicant (other than opium) or hemp, and expression "import" is defined in section 2 (20) as meaning "to bring into the State otherwise than across a custom frontier." There is no evidence on the record that the accused or any of them imported the bottles of foreign liquor into the State. The circumstance that the bottles contained foreign liquor and the accused were residents of the former Portuguese territory of Daman or a locality near about, was not, in our judgment, sufficient to prove that the accused had imported those bottles. The High Court was therefore, in our judgment, in error in convicting the accused of the offence under section 65 (a). Again, there is no evidence, and the High Court has considered none, which establishes that two or more persons had agreed to commit or caused to commit any offence under the Act. Section 83 of the Bombay Prohibition Act provides punishment for conspiracy to commit or cause to commit an offence under the Act. But an inference of conspiracy cannot be made from the facts proved in this case, *viz.*, that the five accused were found in a motor car which contained in its luggage compartment a number of foreign liquor bottles and some of the accused were blood-relations. Conviction for the offence under section 83 is therefore not warranted by the evidence. Again, if accused Nos. 1 and 5 are proved to have committed the substantive offence punishable under section 66 (b) of the Act it is difficult to appreciate how they can also be convicted of abetting the commission of that offence. The offence under section 81 of the Act is therefore also not made out. The appellants were accordingly liable to be convicted only of the offence under section 66 (b) of the Act, and the maximum term of imprisonment for a first offence punishable under that section is rigorous imprisonment for six months and a fine of Rs. 1,000. We accordingly modify the order passed by the High Court and maintain the conviction of accused Nos. 1 and 5 under section 66 (b) and set aside the order of conviction under sections 65 (a), 81 and 83 of the Act and the sentence passed in respect of those offences. We also modify the sentence imposed by the High Court for the offence under section 66 (b) of the Act, and direct that each appellant do suffer rigorous imprisonment for six months and pay a fine of Rs. 500, and in default of payment of fine do suffer rigorous imprisonment for one month and fifteen days.

Subject to that modification the appeal is dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT :—B. P. SINHA, *Chief Justice*, S. J. IMAM, K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH AND N. RAJAGOAPLA AYYANGAR, JJ.

B. M. Ramaswamy

.. Appellant*

v.

B. M. Krishnamurthy and others

.. Respondents.

Election—Panchayat—Electoral roll for election—As prepared under the Representation of the People Act (XLIII of 1950)—Electoral Registration Officer—Order including a name in the list without complying with procedure prescribed under the Act—Order illegal not a nullity—No jurisdiction in Civil Court to question legality—Setting aside election—Jurisdiction of the Munsif—Confined to reasons mentioned in the Act.

Mysore Village Panchayats and Local Boards Act (Mysore Act X of 1959), sections 9, 10, 11.

Representation of the People Act (XLIII of 1950), section 30.

Under sections 9 and 10 of the Act, the electoral roll for the purposes of an election to a Panchayat shall be the electoral roll prepared under the provisions of the Representation of the People Act (Central Act XLIII of 1950) for the time being in force, and any person whose name was in the list of voters was qualified to be elected as a member of the Panchayat.

Under section 30 of the Representation of the People Act, no civil Court shall have jurisdiction to question the legality of any action taken by, or under the authority of, the Electoral Registration Officer. The terms of the section are clear and the action of the Electoral Registration Officer, including the name of a person, though illegal, cannot be questioned in a civil Court. It could be rectified only in the manner prescribed by law, i.e. by preferring an appeal under rules 24 of the Rules, or by resorting to any other appropriate remedy.

On the facts, an application was filed before the Registration Officer for inclusion of the appellant's name in the electoral roll; the Electoral Registration Officer did not follow the procedure prescribed in rule 26 relating to the posting of the application in a conspicuous place and inviting objections to such an application. The inclusion of the name of the appellant in the electoral roll was therefore clearly illegal.

The action of the Registration Officer however is not a nullity. The officer has jurisdiction to entertain the application for inclusion of the name in the roll and take such action as he deems fit. The non-compliance with the procedure prescribed does not affect his jurisdiction, though it may render the order illegal, liable to be set aside in appeal or by resorting to appropriate remedy.

There is no provision in the Act which enables the High Court to set aside the election on the ground that though the name of a candidate is in the list, it had been included therein illegally. The Act confers a special jurisdiction on the Munsif to set aside an election and he can do so only for the reasons mentioned in the Act.

Appeal by Special Leave from the Judgment and Order, dated the 2nd August, 1961, of the Mysore High Court in Writ Petition No. 814 of 1961.

B. Vedantiengar, Advocate and S. N. Andley, Advocate of M/s. Rajinder Narain & Co., for Appellant.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave arises out of a dispute in respect of the election to the Panchayat of Byappanahalli, from its first constituency in the State of Mysore

The calendar of events for the said election was as follows:

Notification of election	..	6—2—1960
Date by which candidates had to file nomination papers	..	16—3—1960
Date of scrutiny of nomination papers	..	18—3—1960
Poll	..	13—4—1960
Declaration of result	..	14—4—1960

The appellant and five others filed their nomination papers within the prescribed date. The polling took place on the scheduled date, namely, 13th April, 1960. The candidates secured votes as mentioned under :

Appellant	169 votes
Respondent 2	158 votes
Respondent 1	128 votes
Respondent 3	115 votes
Respondent 4	38 votes
Respondent 5	46 votes

The appellant and respondent 2 were duly declared elected to the Panchayat.

Respondent 1 filed an election petition under section 13 of the Mysore Village Panchayats and Local Boards Act, 1959 (Mysore Act X of 1959), hereinafter called the Act, in the Court of the Second Munsiff, Bangalore, for a declaration that the appellant was not duly elected and for a further declaration that the first respondent was duly elected. The case of the first respondent, as disclosed in his petition, was that on the date fixed for filing of nominations the appellant's name was not in the authenticated list of voters published under rule 3, clause (5) of the Mysore Panchayats and Taluk Boards Election Rules, 1959, hereinafter called the Rules, and, therefore, he was not entitled to file his nomination. It was his further case that the appellant was not ordinarily a resident of Byappanahalli and, therefore, he was disqualified from standing for the election from that constituency.

The learned Munsiff held on the second point that the appellant was ordinarily a resident of the said village and was, therefore, qualified to be included in the electoral roll of the Panchayat, but he came to the conclusion that his name was not included in the authenticated list of voters of the said Panchayat. On that finding, he set aside the election of the appellant and declared the first respondent, who secured the next highest number of votes, to have been duly elected in his place.

On appeal, the learned Judges of the High Court, after noticing the finding of the Munsiff to the effect that the appellant's name was not included in the authenticated list of voters for the Panchayat, observed that they did not agree with the reasoning given by the learned Munsiff, but they agreed with his conclusion on the basis of a different reasoning. They held that though the name of the appellant was included before the prescribed date in the electoral roll of the legislative constituency under section 23 of the Representation of the People Act, 1950, it was so included in direct violation of rule 26 of the Representation of the People Rules, 1956 and that, therefore, the said inclusion was void. Having so held, they agreed with the learned Munsiff that the appellant's election was liable to be set aside. Hence the appeal. It may be mentioned that there was no appearance on the side of the respondents.

Before considering the point raised, it will be convenient to clear the ground. Section 9 of the Act reads :

“ The electoral roll of the Mysore Legislative Assembly for the time being in force for such part of the constituency of the Assembly as is included in any Panchayat constituency shall, for the purpose of this Act, be deemed to be the list of voters for such Panchayat constituency. The Secretary of the Panchayat shall maintain in the prescribed manner a list of voters for each Panchayat constituency. *Explanation.*—For the purpose of this section, electoral roll shall mean an electoral roll prepared under the provisions of the Representation of the People Act, 1950 (Central Act XLIII of 1950) for the time being in force.”

Section 10 says,

“ Every person whose name is in the list of voters of any Panchayat constituency shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to be elected as a member of the Panchayat :.....”

Rule 3 of the Rules prescribed the mode of maintenance and custody of list of voters. It says, among other things that the Secretary of the Panchayat shall maintain a list of voters for each Panchayat constituency, that he shall authenticate such list by affixing on it the seal of the Panchayat, and that he shall, from time to time, carry out in the authenticated copy of each such list, any corrections that may be made in

the electoral roll of the Mysore Legislative Assembly and initial below each correction so made. It will be clear from the said provisions that the relevant part of the electoral roll of the Mysore Legislative Assembly is deemed to be the list of voters for the Panchayat constituency, and that the Secretary of the Panchayat has to maintain a duly authenticated separate list of voters of the said constituency. The learned Munsiff held that, as the said authenticated list of Panchayat voters was not produced before him, it was not established that the name of the appellant was included therein on the date of nomination. The learned Judges of the High Court did not accept the said finding on the ground that they did not agree with the reasoning given by the learned Munsiff; but unfortunately they have not given their reasons for differing from him. But a perusal of the election petition shows that the first respondent accepted in his petition that the name of the appellant was included in the said authenticated list on the date when he filed his nomination paper. Presumably because of that fact, the learned Judges of the High Court did not think fit to sustain the finding of the learned Munsiff. In view of the said admission in the petition, it cannot be expected of the appellant to summon the authenticated list to prove what has already been admitted.

This leads us to the consideration of the only substantial question that arises in the appeal. Learned Counsel for the appellant contends that the High Court went wrong in considering the question of the legality of the inclusion of the appellant's name in the electoral roll of the Mysore Legislative Assembly, as, under section 30 of the Representation of the People Act, the jurisdiction of civil Courts to question the legality of an action taken by, or under the authority of, the Electoral Registration Officer, was barred.

It is common case that the name of the appellant was included in the electoral roll of the Mysore Legislative Assembly before the date prescribed for filing of nomination papers. But it is said that the Electoral Registration Officer did not follow the procedure prescribed in that behalf. The provisions relevant to the question raised may be read conveniently at this stage. Section 32 of the Representation of the People Act, 1950, reads :

(1) Any person whose name is not included in the electoral roll of a constituency may apply in the manner hereinafter provided for the inclusion of his name in that roll.

Rule 26 of the Representation of the People (Preparation of Electoral Rolls) Rules, 1956, says :

(1) Every application under sub-section (1) of section 23 shall be made in duplicate in Form 4 (Part I) and shall be accompanied—

(a) where it is to the Chief Electoral Officer, by a fee of ten rupees, and

(b) where it is to the Electoral Registration Officer, by a fee of one rupee.

(2) The fee specified in sub-section (1) shall be paid by means of non-judicial stamps.

(3) The Chief Electoral Officer or, as the case may be, the Electoral Registration Officer shall immediately on receipt of such application, direct that one copy thereof be posted in some conspicuous place in his office together with a notice inviting objections to such application within a period of seven days from the date of such posting.

(4) The Chief Electoral Officer or, as the case may be, the Electoral Registration Officer shall, as soon as may be after the expiry of the period specified in sub-rule (3), consider the objections, if any, received by him and shall, if satisfied that the appellant is entitled to be registered in the electoral roll, direct his name to be included therein.

Section 24 of the Representation of the People Act, 1950, provides,

An appeal shall lie within such time and in such manner as may be prescribed—

(a) to the Chief Electoral Officer, from any order of the Electoral Registration Officer under section 22 or section 23, and

(b) to the Election Commission, from any order of the Chief Electoral Officer under section 23.

Rule 27 of the Representation of the People (Preparation of Electoral Rolls) Rules, 1956, prescribes the procedure for preferring appeals.

It is not disputed that an application was filed before the registration officer for the inclusion of the appellant's name in the electoral roll; it is also common case that the electoral registration officer did not follow the procedure prescribed in rule 26 relating to the posting of the application in a conspicuous place and inviting objections to such application. It cannot, therefore, be denied that the inclusion of the name of the appellant in the electoral roll was clearly illegal. Under section 30 of the Representation of the People Act, 1950, no civil Court shall have jurisdiction to question the legality of any action taken by, or under the authority of, the electoral registration officer. The terms of the section are clear and the action of the electoral registration officer in including the name of the appellant in the electoral roll, though illegal, cannot be questioned in a civil Court: but it could be rectified only in the manner prescribed by law, *i.e.*, by preferring an appeal under rule 24 of the Rules, or by resorting to any other appropriate remedy. But it was contended before the High Court that the action of the electoral registration officer was a nullity inasmuch as he made the order without giving notice as required by the Rules. We find it difficult to say that the action of the electoral registration officer is a nullity. He has admittedly jurisdiction to entertain the application for inclusion of the appellant's name in the electoral roll and take such action as he deems fit. The non-compliance with the procedure prescribed does not affect his jurisdiction, though it may render his action illegal. Such non-compliance cannot make the officer's act *non est*, though his order may be liable to be set aside in appeal or by resorting to any other appropriate remedy.

The Act proceeds on the basis that the voters' list is final for the purpose of election. Under section 10 of the Act,

"Every person whose name is in the list of voters of any Panchayat constituency shall, unless disqualified under this Act or under any other law for the time being in force, be qualified to be elected as a member of the Panchayat".

The disqualifications are enumerated in section 11. If he was not disqualified—in the present case, the finding is that there was no such disqualification—the appellant was certainly qualified to be elected as a member of the Panchayat. The Act confers a special jurisdiction on the Munsiff to set aside an election, and he can do so only for the reasons mentioned in section 13 (3) of the Act. The relevant provision is in section 13 (3) (A) (d) (i) which relates to the improper acceptance of any nomination. In view of section 10 of the Act, it cannot be said that there is any improper acceptance of the nomination of the appellant, for, his name being in the list of voters, he is qualified to be elected as a member of the Panchayat. There is, therefore, no provision in the Act which enables the High Court to set aside the election on the ground that though the name of a candidate is in the list, it had been included therein illegally.

In this view we do not propose to express our opinion on the question whether, if the election of the appellant was void, the Munsiff could have declared the first respondent to have been duly elected in his place.

For the aforesaid reasons, we cannot agree with the conclusion arrived at either by the learned Munsiff or by the learned Judges of the High Court. In the result, the appeal is allowed and the election petition is dismissed with costs throughout.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—P. B. GAJENDRAGADKAR, K. C. DAS GUPTA AND J. R. MUDHOLKAR JJ.

Jai Dev and another

.. Appellants*

v.

The State of Punjab

.. Respondent.

Penal Code (XLV of 1860), sections 96, 100—Right of private defence—Principles—Onus of proof on person claiming right—Accused facing hostile mob of villagers—Right of private defence initially with the accused—Killing people when mob fleeing away—Victim standing at a far distance—Right, if available.

Criminal Procedure Code (V of 1898), section 342 and 423—Examination of accused by Court—Scope, extent and purpose of—Overstatements of partisan witnesses—Appreciation of oral evidence by trial Court—Power of Appellate Court to review evidence.

Criminal Trial—Sentence—Extenuating circumstances—Mitigation.

Where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or *malicious*. In judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. In the exercise of the right, he must use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared.

On the facts and on the basis the accused had initially the right of private defence in facing a hostile mob of villagers, when the accused used the rifles against the victim standing at a considerable distance from them, and all the villagers had run away, there was obviously no threat continuing and so, the right of private defence had clearly and unambiguously come to an end.

It is for the party pleading self-defence to prove the circumstances giving rise to the exercise of the right of self-defence.

The examination of the accused person under section 342 of the Code is undoubtedly intended to give him an opportunity to explain any circumstances appearing in the evidence against him. The ultimate test in determining whether or not the accused has been fairly examined would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. The examination should be neither brief nor unduly detailed.

It is true that in dealing with oral evidence, a Court of Appeal would normally be reluctant to differ from the appreciation of oral evidence by the trial Court because obviously the trial Court has the advantage of watching the demeanour of the witnesses; but that is not to say that even in a proper case, the Appeal Court cannot interfere with such appreciation. Where the criticism of the trial Court was not in regard to the demeanour of the witnesses but in regard to their partisan character and the over-statements made as such witnesses, the Appeal Court can review the evidence and come to its own conclusion.

Taking into account the background of the incident, the nature and extent of the threat held out, the excitement which must have been caused at the time of the incident, though the threat had ceased to exist the excitement in their minds may have continued and in the special circumstances of the case, the extreme death penalty was reduced to one of life imprisonment.

Appeals by Special Leave from the Judgment and Order dated 4th October, 1961, of the Punjab High Court in Criminal Appeals Nos. 635 and 636 of 1961 and Murder Reference No. 59 of 1961.

Frank Anthony, Ghansham and P. G. Aggarwala, Advocates, for Appellants (In Crl. Appeals Nos. 56 and 57 of 1962).

N. S. Bindra, Senior Advocate, and Kartar Singh, Assistant Advocate-General, for the State of Punjab (P. D. Menon, Advocate, with them), for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, J.—The two appellants Jai Dev and Hari Singh along with four others Yudhbir Singh Dhanpat Singh, Sajjan Singh and Parbhathi were charged with having committed offences under section 148 and section 302 and 326 both

read with section 149. The case against them was that on 14th September, 1960, they formed themselves into an unlawful assembly in the area of Dhani Khord and that the common object of this unlawful assembly was to commit the offence of rioting while armed with deadly weapons and that in pursuance of the said common object the offence of rioting was committed. That is how the charge under section 148 was framed. The prosecution further alleged that on the same day and at the same time and place, while the accused persons were members of an unlawful assembly, they had another common object of committing the murders of Hukma, Jai Narain, Jai Dev, Amin Lal, Mst. Sagroli and Mst. Dil Kaur and that in pursuance of the said common object, the said persons were murdered. Dhanpat Singh killed Hukma, Sajjan Singh attacked Hukma, Yudhbir Singh shot at Amin Lal, Jai Dev shot at Mst. Sagroli and victim Jaidev, and Hari Singh shot at Jai Narain and Parbhathi killed Mst. Dil Kaur. It is the murder of these six victims which gave rise to the charge against the six accused persons under section 302/149 of the Indian Penal Code. An assault made by the members of the said assembly on Ram Chander Juglal, Mst. Chand Kaur, Sirya, Murti and Murli gave rise to a similar charge under section 326/149. At the same trial along with these six persons, Basti Ram was tried on the charge that he had abetted the commission of the offence of murder by the members of the unlawful assembly and thus rendered himself liable to be punished under section 302/109, Indian Penal Code. The case against these seven accused persons was tried by the learned Additional Sessions Judge, Gurgaon. He held that the charges against Parbhathi and Basti Ram had not been proved beyond a reasonable doubt; so, he acquitted both the said accused persons. In respect of the remaining five accused persons, the learned Judge held that all the three charges framed against them had been proved beyond a reasonable doubt. For the offence of murder, the learned Judge directed that all the five should be hanged; for the offence under section 326/149 he sentenced each one of them to two years' rigorous imprisonment and for the offence under section 148 he sentenced each one to suffer R. I. for one year. These two latter sentences were ordered to run concurrently and that too if the death penalty imposed on them was not confirmed by the High Court.

Against this order of conviction and sentence, three appeals were preferred on behalf of the five condemned persons. The sentences of death imposed on them were also submitted for confirmation. The Punjab High Court dealt with the confirmation proceedings and the three appeals together and held that the conviction of Yudhbir Singh, Dhanpat Singh and Sajjan Singh was not justified and so, the said order of conviction was set aside and consequently, they were ordered to be acquitted and discharged. In regard to Jai Dev and Hari Singh the High Court differed from the view taken by the trial Court and held that they were guilty not under section 302/149 but only under section 302, Indian Penal Code. In the result, the appeals preferred by them were dismissed and their conviction for the offence of murder and the sentence of death imposed on them were confirmed. It is this order which is challenged by the two appellants before us in their appeals Nos. 56 and 57 of 1962. These two appeals have been brought to this Court by Special Leave.

The incident which has given rise to the present criminal proceedings occurred in Khasra No. 388 in Mauza Ahrod known as "Inamwala field" on 14th September, 1960, at about 10-30 A.M. This incident has led to the death of six persons already mentioned as well as the death of Ram Pat who belonged to the faction of the appellants. It has also resulted in injuries to nine persons three of whom belonged to the side of the appellants and six to the side of the complainants. The incident itself was in a sense a tragic and gruesome culmination of the battle for possession of the land which was waged between the appellants on the one hand and the faction of the complainants on the other. One of the principal points which fell to be considered in the courts below was : who was in possession of the said field at the material time? The appellants pleaded that they were in possession of the field and were cultivating the field at the time of the incident, whereas the prosecution contends

that the complainants' party was in possession of the field and the appellants virtually invaded the field and caused this massacre.

The prosecution case is that between 9 and 10 A.M. on the date of the offence, the appellants and their brothers Ram Pat and Basti Ram came to the field with their tractor and started ploughing the bajra crop which had been sown by the villagers who were tenants in possession. Jug Lal, Amin Lal, Ram Chander, Sunda, Jai Dev, Hukma and others remonstrated with the appellants that the crops raised by them should not be destroyed. Dhanpat Singh who was driving the tractor was armed with pharsi while the appellants were standing armed with rifles. Yudhbir Singh had a pistol. Sajjan Singh and Parbhathi had pharsis and Ram Pat had a bhalla. Thus, all the appellants were armed with deadly weapons and three of them had fire-arms. According to the prosecution, the remonstrance made by Juglal and others did not help and the appellants told them that they had got possession of the land and that they would not permit any interference in their ploughing operations. That inevitably led to an altercation and an attempt was made to stop the working of the tractor. This immediately led to the terrible scuffle which resulted in so many deaths. Sajjan Singh gave a pharsi blow to Juglal whose left arm was touched. Thereupon, Ram Pat raised his bhalla against Juglal causing injuries to the latter on the left side of the abdomen and on the right hand wrist. Hukma then snatched the bhalla from the hands of Ram Pat and gave a blow to him in self-defence. As a result, Ram Pat fell on the ground and died. Sajjan Singh, Dhanpat Singh and Parbhathi then gave blows to Hukma with pharsis. Hukma fell on the ground unconscious. At this stage, Amin Lal asked the appellants and their friends not to kill people but the only result of this intercession was that he was shot by the pistol of Yudhbir Singh. Then everybody on the complainants' side started to run away. Thereafter Jai Narain was shot dead by the appellant Hari Singh. Dil Kaur was killed by Parbhathi and others, and victim Jai Dev and Mst. Sagroli were shot dead by the appellant Jai Dev. That, in substance, is the prosecution case.

On the other hand, the defence was that all the accused persons had gone to Inamwala field at about 8-30 A.M. on 14th September, 1960, and were engaged in the lawful act of ploughing the land of which they had taken possession. They had put the tractor on the portion of the bajra crop which was 'kharaba' with the object of using it for manure. After this operation had gone on for nearly two hours, a large number of residents of Dhani Sobha and Ahrod, including women, came on the spot armed with deadly weapons and they started abusing and assaulting the accused persons with the weapons which they carried. The accused persons then used jellies, kassi and lathi in self-defence. Amin Lal from the complainants' party was armed with a pistol which he aimed at the accused persons. Sajjan Singh then gave a lathi blow to Amin Lal and in consequence, the pistol fell down on the ground from his hands. It was then picked up by Yudhbir Singh and he used it in retaliation against the assailants and fired five or six rounds. Basti Ram who was charged with abetment of the principal offences denied his presence, while the six other accused persons admitted their presence on the spot and pleaded self-defence.

The prosecution sought to prove its case by leading oral evidence of the witnesses who were present at the scene and some of whom had received injuries themselves. It also relied on documentary evidence and the evidence of the Investigating Officer. Soon after the incident, First Information Report was filed by the appellant Jai Dev in which the version of the accused persons was set out and a case was made out against the villagers. In fact, it was by reason of this F.I.R. that the investigation originally commenced. Subsequently, when it was discovered that on the scene of the offence six persons on the complainants' side had been killed and six injured, information was lodged setting out the contrary version and that led to two cross-proceedings. In one proceeding the members of the complainants' party were the accused, whereas in the other proceeding the appellants and their companions were the accused persons. Since the trial ended in the conviction of the appel-

lants and their companions, the case made out in the complaint filed by the appellant Jai Dev has been held to be not proved.

At this stage, it would be convenient to refer very briefly to the findings recorded by the trial Court and the conclusions reached by the High Court in appeal. The trial Court found that the evidence adduced by the accused persons in support of their case that they had obtained possession of the land before the date of the offence, was not satisfactory and that the documents and the entries made in the revenue papers were no more than paper entries and were not "as good as they looked". According to the learned trial Judge, the actual possession of the land all along remained with the complainants' party Jug Lal and his companions and that the crop standing at the spot at the time of the incident had been sown by and belonged to the complainants' party. This finding necessarily meant that the ploughing of the land by the accused persons was without any lawful justification and constituted an act of trespass. The trial Court accordingly held that the accused persons were the aggressors and that the complainants' party in fact had a right of private defence. That is how it came to the conclusion that the six accused persons were members of an unlawful assembly and had gone to the field in question armed with deadly weapons with a common object of committing the offences which were charged against them. Dealing with the case on this basis, the trial Judge did not think it necessary to enquire which of the victims had been killed by which of the particular accused persons. As we have already indicated, he was not satisfied that the charge had been proved against Parbhati or against Basti Ram; but in regard to the remaining five persons, he held that the evidence conclusively established the charges under section 148 and sections 302 and 326/149. In dealing with the defence, the trial Judge has categorically rejected the defence version that Amin Lal was armed with a pistol and that after the said pistol fell down from his hands it was picked up by Yudhbir Singh. According to the trial Court, no one on the complainants' side was armed with fire-arms, whereas three persons on the side of the accused were armed with fire-arms. Yudhbir Singh had a pistol and the appellants Jai Dev and Hari Singh had rifles.

When the matter was argued before the High Court, the High Court was not inclined to accept the finding of the trial Court on the question of possession. In its judgment, the High Court has referred in detail to the disputes which preceded the commission of these offences in regard to the possession of the land. It appears that this land was given as a charitable gift by the proprietary body of the village Ahrod to one Baba Kanhar Dass many years ago. Thereafter, it continued in the cultivation of Amin Lal, Jug Lal, Charanji Lal and Duli Chand as tenants. Kanhar Dass subsequently sold the entire piece of land to the appellants and their brothers Basti Ram and Ram Pat on 30th May, 1958, for a sum of Rs. 25,000. These purchasers belonged to the village Kulana and so, the villagers of Ahrod treated them as strangers and they were annoyed that the land which had been gifted by the villagers to Kanhar Dass by way of a charitable gift had been sold by him to strangers. In their resentment, the proprietary body of Ahrod filed a declaratory suit challenging the sale-deed soon after the sale-deed was executed. When that suit failed, two pre-emption suits were filed but they were also dismissed. The appellants and their two brothers then filed a suit for possession. In that suit a decree was passed and the documentary evidence produced in the case shows that in execution of the decree possession was delivered to the decree-holders. It appears that some persons offered resistance to the delivery of possession and 15 bighas of land was claimed by the resisters. Litigation followed in respect of that and whatever may be the position with regard to those 15 bighas, according to the High Court, possession of 56 bighas and 6 biswas of land was definitely delivered over to Basti Ram and his brothers on 23rd December, 1959. In other words, reversing the finding of the trial Court on this point, the High Court came to the conclusion that the field where the offences took place was in the possession of the appellants and their companions.

The High Court has also found that the crop in the field had been ploughed by the appellants and their companions and that the operations which were carried

on by them on the morning of 14th September, 1960, did not constitute trespass in any sense. On the evidence, the High Court has come to the conclusion that the villagers who did not tolerate that the strangers should take possession of the land had come to the field to take possession and they were armed. It appears that the number of villagers was much larger than the number of persons on the side of the accused party, though the weapons carried by the latter included fire-arms and so, the latter party had superiority in arms. The High Court has, therefore, come to the conclusion that the party of the accused persons was entitled to exercise its right of private defence. The property of which they were in possession was threatened by persons who were armed with weapons and so, the right to defend their property against an assault which threatened grievous hurt, if not death, gave them the right to use force even to the extent of causing death to the assailants. It is substantially as a result of this finding that the High Court took the view that Sajjan Singh, Yudhbir Singh and Dhanpat Singh who were responsible for the death of the three of the victims were not guilty of any offence. In the circumstances, they were entitled to defend their property against assailants, who threatened them with death, even by causing their death. That is how these three accused persons have been acquitted in appeal. In regard to the appellants Jai Dev and Hari Singh, the High Court has held that at the time when these two appellants caused the deaths of Jai Dev and Jai Narain respectively, there was no apprehension of any danger at all. As soon as Amin Lal was shot dead, all the villagers who had come to the field ran away and there was no longer any justification whatever for using any force against the running villagers. Since at the relevant time the property had been saved from the trespass and the assailants had been completely dispersed, the right of private defence ceased to exist and so, the appellants who were proved to have caused the two deaths could not claim protection either of the right of private defence or could not even plead that they had merely exceeded the right of private defence; so, they are guilty of the offence of murder under section 302. That is how the appellants have been convicted of the said offence and have been ordered to be hanged.

The question which the appeal raises for our decision thus lies within a very narrow compass. The findings of fact recorded by the High Court in favour of the appellants would be accepted as binding on the parties for the purpose of this appeal. In other words, we would deal with the case of the appellants on the basis that initially they and their companions had the right of private defence. Mr. Anthony contends that having regard to the circumstances under which the appellants fired from their rifles, it would be erroneous to hold that the right of private defence had come to an end. According to him, allowance must be made in favour of the appellants in determining the issue, because it is now found that they were faced with an angry mob whose members were armed with weapons and who appeared determined to dispossess the appellants and their friends of the field in question. The decision of the point thus raised by Mr. Anthony would substantially depend upon the scope and effect of the provisions of section 100 of the Indian Penal Code.

Section 100 provides, *inter alia*, that the right of private defence of the body extends under the restrictions mentioned in section 99, to the voluntary causing of death if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault. In other words, if the person claiming the right of private defence has to face assailants who can be reasonably apprehended to cause grievous hurt to him, it would be open to him to defend himself by causing the death of the assailant.

In appreciating the validity of the appellants' argument, it would be necessary to recall the basic assumptions underlying the law of self-defence. In a well-ordered civilised society it is generally assumed that the State would take care of the persons and properties of individual citizens and that normally it is the function of the State to afford protection to such persons and their properties. This, however, does not mean that a person suddenly called upon to face an assault must run away and thus protect himself. He is entitled to resist the attack and defend himself. The

same is the position if he has to meet an attack on his property. In other words, where an individual citizen or his property is faced with a danger and immediate aid from the State machinery is not readily available, the individual citizen is entitled to protect himself and his property. That being so, it is a necessary corollary to the doctrine of private defence that the violence which the citizen defending himself or his property is entitled to use must not be unduly disproportionate to the injury which is to be averted or which is reasonably apprehended and should not exceed its legitimate purpose. The exercise of the right of private defence must never be vindictive or malicious.

There can be no doubt that in judging the conduct of a person who proves that he had a right of private defence, allowance has necessarily to be made for his feelings at the relevant time. He is faced with an assault which causes a reasonable apprehension of death or grievous hurt and that inevitably creates in his mind some excitement and confusion. At such a moment, the uppermost feeling in his mind would be to ward off the danger and to save himself or his property, and so, he would naturally be anxious to strike a decisive blow in exercise of his right. It is no doubt true that in striking a decisive blow, he must not use more force than appears to be reasonably necessary. But in dealing with the question as to whether more force is used than is necessary or than was justified by the prevailing circumstances, it would be inappropriate to adopt tests of detached objectivity which would be so natural in a court-room, for instance, long after the incident has taken place. That is why in some judicial decisions it has been observed that the means which a threatened person adopts or the force which he uses should not be weighed in golden scales. To begin with, the person exercising a right of private defence must consider whether the threat to his person or his property is real and immediate. If he reaches the conclusion reasonably that the threat is immediate and real, he is entitled to exercise his right. In the exercise of his right, he must use force necessary for the purpose and he must stop using the force as soon as the threat has disappeared. So long as the threat lasts and the right of private defence can be legitimately exercised, it would not be fair to require, as Mayne has observed, that "he should modulate his defence step by step, according to the attack, before there is reason to believe the attack is over"¹. The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety. It entitles him to defend himself and law gives him the right to secure his victory over his assailant by using the necessary force. This necessarily postulates that as soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. If the danger is continuing, the right is there; if the danger or the apprehension about it has ceased to exist, there is no longer the right of private defence (*vide* sections 102 and 105 of the Indian Penal Code). This position cannot be and has not been disputed before us and so, the narrow question which we must proceed to examine is whether in the light of this legal position, the appellants could be said to have had a right of private defence at the time when the appellant Jai Dev fired at the victim Jai Dev and the appellant Hari Singh fired at the victim Jai Narain.

In dealing with this question, the most significant circumstance against the appellants is that both the victims were at a long distance from appellants when they were shot dead. We will take the case of victim Jai Dev first. According to Gurbux Singh (P.W. 37), Assistant Sub-Inspector, the dead body of Jai Dev was found at a distance of 70 paces from the place of the tractor, but it was discovered that it had been dragged from a place at a longer distance where Jai Dev stood when he was fired dead. From that place to the place where his dead body was actually found there was a trail of blood which unambiguously showed that Jai Dev fell down at a more distant place and that he was dragged nearer the scene of the offence after he fell down. This statement is corroborated by the memo. prepared on 14th September,

1. Mayne's Criminal Law of Indians, 4th Ed., p. 231.

1960 (item No. 104)... Blood-stained earth was taken from both these spots. Roughly stated, the spot where Jai Dev was shot at can be said to be about 300 paces away from the tractor where the appellant Jai Dev stood. It is true that Gurbux Singh made no express reference to the trail of blood in the rough site plan which he had prepared on the day of the offence. But item 8 in the plan, we were told, does refer to the dragging and that is enough corroboration to the evidence of Gurbux Singh. Besides, in considering the effect of the omission to mention the trail of blood in the rough plan, we cannot ignore the fact that at that time Gurbux Singh's mind was really concentrated on the F.I.R. received by the Police from the appellant Jai Dev himself and that means that at that time the impression in the mind of Gurbux Singh must have been that the deceased Jai Dev belonged to the party of the aggressors and so, blood marks caused by the dragging of his body may not have appeared to him to be of any significance. However that may be, the sworn testimony of Gurbux Singh is corroborated by the memo. contemporaneously prepared and it would be idle to suggest that this evidence should be disbelieved because the rough site plan prepared by Gurbux Singh does not refer to the trail of blood.

Mr. Anthony has, however, strongly relied on the statement of Juglal (P.W. 13) who has narrated the incident as it took place, and in that connection has stated that the accused Jai Dev then opened fire from his rifle killing Jai Dev deceased at the spot. It is suggested that the words "at the spot" show that the victim Jai Dev was standing at the spot when the appellant Jai Dev shot at him. We are not inclined to accept this contention. What the witness obviously meant was that from the spot where the appellant Jai Dev was standing he fired at the victim Jai Dev. Besides, reading the account given by Juglal as a whole, it would not be fair to treat the words "at the spot" in that technical way. Similarly, the argument that according to Jai Dev all the shots were fired almost simultaneously, is also not well-founded. When a witness gives an account of an incident like this, he is bound to refer to one event after another. That does not mean that the two appellants and their companions fired almost simultaneously. Therefore, we are not satisfied that the evidence of Juglal supports the argument that the victim Jai Dev was near the scene of the offence when the appellant Jai Dev fired at him.

Mr. Anthony has also relied on the statement of Chuni Lal (P.W. 16) in support of the same argument. But it is clear that this witness was obviously making a mistake between the two documents P.N.F. and P.N.E. A statement like this which is the result of confusion cannot legitimately be pressed into service for the purpose of showing that victim Jai Dev was near about the scene of the offence. Then again, the statement of Hira Lal (P.W. 5), on which Mr. Anthony relies shows that in the committing Court he had said that Jai Dev had been injured at the spot; but he has added that he had said so because subsequently after the occurrence, he saw the dead body of Jai Dev near the scene of the offence. Therefore, in our opinion, having regard to the evidence on the record, the High Court was right in coming to the conclusion that Jai Dev deceased was standing at a fairly long distance from the scene of the offence when he was shot at.

That takes us to the case of the victim Jai Narain. Jai Narain was in fact not in the Inamwala field at all. According to the prosecution, he was on the machan in the adjoining field which he was cultivating and it was whilst he was in his own field that the appellant Hari Singh fired at him. The distance between the appellant and the victim has been found to be about 400 paces. Now this conclusion is also supported by evidence on the record. Jai Narain's mother, Chand Kaur (P.W. 10) says that she saw her son falling on the ground from the machan, and that clearly means the machan in the field of which Jai Narain was in possession. The position of this field is shown in the rough plan and sketch prepared by the Sub-Inspector (P.A.J.). The evidence of Hira Lal (P.W. 5) supports the same conclusion, and Gurbux Singh swears to the same fact. He says that the dead body of Jai Narain was found lying at a distance of more than 400 paces from the point where the tractor was said to be standing at the time of the occurrence. That is the effect

of the evidence of Juglal (P.W. 13) also. Thus, there can be no doubt that the victim Jai Narain was at a long distance from the field in question and like the appellant Jai Dev who took a clean aim at the victim Jai Dev who was standing at a distance and shot him dead, the appellant Hari Singh also took a clean aim at the victim Jai Narain who was away from him and shot him dead. That is the conclusion of the High Court and we see no reason to interfere with it.

In the course of his arguments, Mr. Anthony relied on the fact that some of the prosecution witnesses on whose evidence the High Court has relied were not accepted by the trial Court as truthful witnesses, and he contends that the High Court should not have differed from the appreciation of evidence recorded by the trial Court. There are two obvious answers to this point. In the first place, it is not wholly accurate to say that the trial Court has completely disbelieved the evidence given by the prosecution witnesses. It may be conceded in favour of Mr. Anthony that in dealing with a part of a prosecution case relating to Parbhati and Basti Ram the trial Court did not accept the evidence of the witnesses which incriminated them, and in that connection, he has referred to the criticism made by the defence against those witnesses and has observed that there is force in that criticism. But, while appreciating the effect of the observations made by the trial Court in dealing with that particular aspect of the matter, we cannot lose sight of the fact that as to the actual occurrence the trial Court, in substance, has believed the major part of the prosecution evidence and has stated that the said evidence is quite consistent with medical evidence. In other words, the sequence of events, the part played by the assailants as against the specific victims and the rest of the prosecution story have, on the whole, been believed by the trial Court. In this connection, we ought to add that the trial Court did not feel called upon to consider the individual case of each one of the accused persons because it held that a charge under section 149 had been proved. But when the High Court came to a contrary conclusion on that point, it became necessary for the High Court to examine the case against each one of the accused persons before it, and so, it would not be accurate to say that the High Court has believed the witnesses whom the trial Court had entirely disbelieved. That is the first answer to Mr. Anthony's contention. The second answer to the said contention is that even if the trial Court had disbelieved the evidence, it was open to the High Court, on a reconsideration of the matter, to come to a contrary conclusion. It is true that in dealing with oral evidence, a Court of Appeal would normally be reluctant to differ from the appreciation of oral evidence by the trial Court because obviously the trial Court has the advantage of watching the demeanour of the witnesses; but that is not to say that even in a proper case, the Appeal Court cannot interfere with such appreciation. Besides, the criticism made by the trial Court is not so much in relation to the demeanour of the witnesses as in regard to their partisan character and the over-statements which they made, as partisan witnesses are generally apt to do. Therefore, we see no justification for contending that the finding of the High Court as to the distances at which the victims Jai Dev and Jai Narain were shot at should not be accepted.

Mr. Anthony then argued that the fact that the victims were at a long distance from the assailants when they were fired at, will not really be decisive of the point which we are called upon to consider in the present appeal. He contends that if the assailants were surrounded by a very big mob some of whom were armed with deadly weapons and all of whom were determined to dispossess them at any cost, it was open to the appellants and their companions to shoot at the mob because they were themselves reasonably apprehensive of an assault by the mob which would have led at least to grievous hurt, if not death; and he argues that if three of the assailants who had fire-arms fired almost simultaneously, that would be within the legitimate exercise of the right of private defence and the fact that somebody was killed who was standing at a distance, would make no difference in law. The argument thus presented is no doubt *prima facie* attractive; but the assumption of fact on which it is based is not justified in the circumstances of this case. The High Court has found that at the time when the appellants fired shots from their rifles, the villagers had already started running away and there was no danger either to the property or

to the bodies of the assailants. In this connection, it is important to remember that the defence version that Amin Lal had a pistol had been rejected by both the Courts, so that whereas the crowd that threatened the appellants and their friends was larger in number, the weapons in the hands of the assailants were far more powerful than the weapons in the hands of the crowd. Having regard to the events that took place and the nature of the assault as it developed, it is clear that Amin Lal who was one of the leaders of the villagers was shot dead and that, according to the evidence, completely frightened the villagers who began to run away helter-skelter. Sunda (P.W. 4) has described how Amin Lal stepped forward for the help of Hukma, but he was fired at from the pistol by Yudhbir Singh, and having received a fatal injury on his chest Amin Lal fell down dead on the ground. This witness adds "the members of the complainant party feeling frightened because of the firing opened by Yudhbir Singh ran in the direction of the village abadi". Similarly, the statement of Mst. Sarian (P.W. 12) would seem to show that when the victim Jai Dev was fired at, he had run away. On the probabilities, it is very easy to believe that when the villagers found that the appellants and their friends were inclined to use their fire-arms, they must have been frightened, even the large number of the villagers would have meant nothing. The large number would have merely led to a large number of deaths—that is about all. Therefore, as soon as fire-arms were used for the first time killing Amin Lal on the spot, the villagers must have run away. That is the evidence given by some of the witnesses and that is the conclusion of the High Court. It is in the light of this conclusion that we have to deal with the point raised by Mr. Anthony. If, at the time when the two appellants used their rifles against their respective victims standing at considerable distances from them, all the villagers had run away, there was obviously no threat continuing and so, the right of private defence had clearly and unambiguously come to an end. That is why we think the High Court was right in holding that the appellants were guilty of murder under section 302.

That leaves two minor questions to be considered. Mr. Anthony has contended that the examination of the appellant Hari Singh under section 342 has been very defective in regard to the question of distance on which the prosecution strongly relied against him before the High Court, and he argues that this defect in the examination of the appellant Hari Singh really vitiates the trial. It is true that in asking him questions, the learned trial Judge did not put the point of distance between him and the victim Jai Narain clearly; but that in our opinion, cannot by itself necessarily vitiate the trial or affect the conclusion of the High Court. In dealing with this point, we must have regard to all the questions put by the trial Judge to the appellant. Besides, it is not so much the point of distance by itself which goes against the appellant Hari Singh as the conclusion that at the time when he fired at Jai Narain, the threat had ceased; and if the threat had ceased and there was no justification for using the fire-arms, the appellant would be guilty of murder even if Jai Narain was not far away from him. It is unnecessary to emphasise that it is for the party pleading self-defence to prove the circumstances giving rise to the exercise of the right of self-defence and this right cannot be said to be proved as soon as we reach the conclusion that at the relevant time there was no threat either to the person of the appellant or the person or property of his companions.

In support of his contention that the failure to put the relevant point against the appellant Hari Singh would affect the final conclusion of the High Court, Mr. Anthony has relied on a decision of this Court in *Hate Singh Bhagat Singh v. State of Madhya Bharat*¹. In that case, this Court has no doubt referred to the fact that it was important to put to the accused each material fact which is intended to be used against him and to afford him a chance of explaining it if he can. But these observations must be read in the light of the other conclusions reached by this Court in that case. It would, we think, be incorrect to suggest that these observations are intended to lay down a general and inexorable rule that wherever it is found that one of the points used against the accused person has not been put to him, either the trial

is vitiated or his conviction is rendered bad. The examination of the accused person under section 342 is undoubtedly intended to give him an opportunity to explain any circumstances appearing in the evidence against him. In exercising its powers under section 342, the Court must take care to put all relevant circumstances appearing in the evidence to the accused person. It would not be enough to put a few general and broad questions to the accused, for by adopting such a course the accused may not get opportunity of explaining all the relevant circumstances. On the other hand, it would not be fair or right that the Court should put to the accused person detailed questions which may amount to his cross-examination. The ultimate test in determining whether or not the accused has been fairly examined under section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity. It is obvious that no general rule can be laid down in regard to the manner in which the accused person should be examined under section 342. Broadly stated, however, the true position appears to be that passion for brevity which may be content with asking a few omnibus general questions is as much inconsistent with the requirements of section 342 as anxiety for thoroughness which may dictate an unduly detailed and large number of questions, which may amount to the cross-examination of the accused person. Besides, in the present case, as we have already shown, failure to put the specific point of distance is really not very material.

The last argument which Mr. Anthony has urged before us is that the prosecution should have examined a ballistic expert in this case and since no expert has been examined, it cannot be said that the prosecution has proved its case that the appellants caused the deaths of the two victims by shooting from the rifles which they carried. In support of this argument, Mr. Anthony has referred us to the decision of this Court in *Mohinder Singh v. The State*¹. In that case, it has been observed by this Court that it has always been considered to be duty of the prosecution, in a case where death is due to injuries or wounds caused by a lethal weapon, to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. We do not see how this principle can be invoked by Mr. Anthony in the present case. The rifles which the appellants are alleged to have used have not been recovered and so, there was no occasion to examine any expert in respect of the injuries caused to the two victims by the appellants. What Mr. Anthony suggests is that an expert should have been examined for the purpose of determining whether any of the injuries found on the persons of the several victims could have been inflicted by the revolver which had been recovered in this case. Now, the story about the recovery of this revolver is very interesting. According to the defence, Amin Lal was carrying a revolver and when he was hit with a lathi by Sajjan Singh, the revolver fell down from his hands and Yudhbir Singh picked it up and fired it at Amin Lal. Not this revolver was carried away by Yudhbir Singh to his house and he says that he produced the same before the Police Investigating Officer. On the other hand, according to Gurbux Singh it was the accused Sajjan Singh who after his arrest produced the pistol and two live cartridges before him. It would thus appear that the revolver had been produced by one of the accused persons on the allegation that it was carried by Amin Lal and had been used by Yudhbir Singh in self-defence after it had fallen down from Amin Lal's hands. It has not been the prosecution case that it is this revolver which had been used by Yudhbir Singh. It may well be that the revolver has been deliberately surrendered by the accused in order to introduce complications in the case. We think, in such a case it is difficult to understand for what purpose the prosecution was expected to examine the expert. Therefore, in our opinion, the decision in the case of *Mohinder Singh*¹, has no application to the case before us.

In the result, we agree with the High Court in holding that the two appellants are guilty of murder under section 302.

The only question which now remains to be considered is one of sentence. Mr. Bindra for the State has left this question to us since, presumably, he did not feel justified in pressing for the imposition of the sentence of death. We have carefully considered all the facts leading to the commission of this offence and we are not inclined to accept the view of the High Court that the circumstances of this case require the imposition of the maximum penalty on the two offenders. On the question of sentence, it would be relevant to take into account the background of the incident, the nature and extent of the threat held out by the crowd of villagers, the excitement which must have been caused at the time of the incident, and so, though we have felt no difficulty in agreeing with the decision of the High Court that at the time when the two appellants fired shots from their rifles the threat had ceased to exist, it would not be unreasonable to take into account the fact that the excitement in their minds may have continued, and that, in the special circumstances of this case, may be regarded as an extenuating circumstance. We, therefore, think that the ends of justice would be met if the sentence of death imposed on the two appellants is set aside and instead, an order is passed directing that they should suffer imprisonment for life. Accordingly, we confirm the conviction of the appellants under section 302 and convert the sentence of death imposed on them into one of imprisonment for life.

V.S.

Sentences reduced.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction)

PRESENT:—P.B. GAJENDRAGADKAR, K.C. DAS GUPTA AND J.R. MUDHOLKAR, JJ.

The Amritsar Rayon and Silk Mills (Private) Ltd.

*Appellant**

v.

Their Workmen

Respondents.

Industrial Disputes Act (XIV of 1947)—Gratuity scheme—Need to fix a ceiling on gratuities.

Where there is no provision for superannuation and gratuity is paid at a fairly reasonable rate, gratuity schemes framed by Industrial Tribunals generally provide for a ceiling. In the instant case having regard to all the circumstances it would be reasonable if the maximum amount of gratuity payable under the scheme is fixed at 15 months' basic wages.

In framing gratuity schemes, all the relevant factors have to be taken into account and so, inevitably the schemes are likely to differ from case to case.

Appeal by Special Leave from the Award dated the 6th November, 1960, of the Industrial Tribunal, Punjab, in Reference No. 43 of 1958.

M. C. Setalvad, Attorney-General for India (*S. K. Kapur*, *Bishambher Lal*, *B. N. Kripal* and *K.K. Jain*, Advocates, with him), for Appellant.

Janardan Sharma, Advocate, for Respondents.

The Judgment of the Court was delivered by

Gajendragadkar, J.—This appeal arises out of an industrial dispute between the appellant Amritsar Rayon and Silk Mills and its workmen. The dispute originally related to seven demands made by the respondents against the appellant and these seven demands were referred by the Punjab Government for industrial adjudication to the Industrial Tribunal, Jullunder, under section 10 (1) (d) of the Industrial Disputes Act, 1947. The Tribunal has made its award in respect of these demands. In the present appeal, which has been brought to this Court by Special Leave, we are concerned with the award in so far as it deals with the respondents' claim for a gratuity scheme. The appellant urged that no case had been made out for the framing of a gratuity scheme. This plea has been rejected by the Tribunal and a gratuity

scheme has been framed. It is the propriety and the validity of this scheme which are challenged before us by Mr. Kapur on behalf of the appellant in this case.

The scheme framed by the Tribunal reads thus :

(1) In case of death of an employee while he is in the service of the concern or his becoming incapable of serving further due to physical or mental disability, one month's basic wages for each year of his service.

In case of death, the gratuity will be payable to the heirs or assigns of the deceased workmen.

(2) On termination of an employee's service by the concern after he has put in five years' service—Half a month's basic wages for each year of his service.

(3) No gratuity would be payable to an employee who resigns his job but if he has served for fifteen years continuously and is rendered unfit to serve further by old age or protracted ill health, he shall be given gratuity calculated at the rate of one month's basic wages for each completed year of his service.

(4) No gratuity would be payable to an employee who is dismissed for misconduct.

In rejecting the appellant's contention that no scheme should be framed, the Tribunal has found that the appellant which was started in 1934 is the biggest Textile Mills in Amritsar and its career so far has been one of success all along the line. The invested capital of the concern is Rs. 14 lakhs and its working capital is Rs. 2,70,000. On its roll are employed 1,250 employees whose monthly wage bill comes to Rs. 1,20,000. It is admitted that the appellant has been paying bonus to its workmen since 1946 and has allowed dividend on invested capital. It contributes to the Provident Fund and the Employees State Insurance Scheme. Having regard to this financial position of the appellant, the Tribunal has held, and we think rightly, that the appellant cannot successfully resist the demand for the framing of a gratuity scheme.

Mr. Kapur, however, contends that even if a gratuity scheme has to be framed, the Tribunal was in error in not placing any ceiling on the amount of gratuity payable to the employees. In our opinion, this contention is well-founded. Speaking generally, where there is no provision for superannuation and gratuity is paid at a fairly reasonable rate, gratuity schemes framed by Industrial Tribunals generally provide for a ceiling, and so, we do not see how the Tribunal was justified in departing from this generally accepted position. The rate fixed in the present case is not unduly low and admittedly, there is no provision for superannuation. Therefore, we think that the appellant is justified in contending that a ceiling should be put on the amount of gratuity payable under the scheme. On the whole, we think it would be reasonable if the maximum amount of gratuity payable under the scheme is fixed at 15 months' basic wages. We ought to make it clear that in coming to this conclusion we do not propose to lay down any hard and fast rule that a ceiling must be placed in every case and that it should be of the order of 15 months' basic wages ; as we have repeatedly observed, in framing gratuity scheme, all relevant factors have to be taken into account and so, inevitably the schemes are likely to differ from case to case.

Mr. Kapur then contends that one month's basic wages which has been provided for by clauses (1) and (3) is excessive and it should be reduced to 15 days basic wages. His argument is that the usual pattern of gratuity schemes in the Punjab shows that it is 15 days' basic wages which is provided under similar clauses. In support of his argument, Mr. Kapur has referred us to some of the awards produced by him. In the gratuity scheme framed in the New India Embroidery Mills, Chheharta, 15 days wages has been adopted as the basis, but this award includes dearness allowance and so, this provision is not very helpful because in the present case, the rate has been fixed by reference to the basic wages alone. The scheme framed in the Niemla Textile Finishing Mills, Chheharta, is on the same lines as the scheme under the New India Embroidery Mills and the same comment, therefore, falls to be made about it. The gratuity scheme in the Technological Institute of Textiles, Bhiwani, has adopted the basis of $\frac{1}{2}$ month's basic wages for each completed year of service, but there is no ceiling placed by the scheme. On the other hand, the gratuity scheme in the Shambhu Nath and Sons Ltd., Amritsar,

adopts one month's basic wages for each completed year of service and so does the scheme in the India Woollen Textile Mills, Chhcharta, and the India Calico Printing Mills. The Jagatjit Cotton Textile Mills Ltd., Phagwara, has $\frac{1}{2}$ month's basic wages; the Punjab Distilling Industries Ltd., provides for one month's basic wages; so does the New Egerton Woollen Mill, Dhariwal. The Jawala Flour Mills, Amritsar, provides for the rate of $\frac{1}{2}$ month's basic wages in case of workmen with five years of service and in case of workmen with service above five years at the rate of one month's basic wages. It would thus be seen that the claim made by the appellant that the pattern of gratuity schemes in the Punjab invariably shows the adoption of the rate of 15 days' basic wages for each completed year of service, is not supported by the several awards produced by the parties before us, and so, it cannot be said that the present award has departed from any fixed uniform pattern in the matter.

Mr. Kapur then referred to the decision of this Court in *Bharatkhand Textile Mfg. Co., Ltd. & Others v. The Textile Labour Association, Ahmedabad*¹, where the gratuity scheme provided, *inter alia*, for one month's basic wages for each completed year of service for the period before the coming into force of the Employees Provident Funds Act, 1952, and half a month's basic wages for each completed year of service thereafter, subject to a maximum of 15 months' basic wages. This shows that the award with which this Court was dealing in that case had made a distinction between gratuity schemes prior to 1952 and those subsequent to it, and this distinction was based on the fact that the Employees' Provident Funds Act had come into force in 1952. Therefore, we do not think it would be fair to suggest that because the scheme thus framed was accepted by this Court in appeal it follows that this Court has laid down that in every case half a month's basic wages should be paid after 1952.

Mr. Kapur has also relied on the decision of the Industrial Tribunal at Rajkot in *Arvind Mills Co-operative Supply Society Ltd., Ahmedabad & Another v. Their Workmen*². The scheme framed by the Tribunal in this case no doubt provides for 15 days' basic wages as contended by Mr. Kapur and prescribes the ceiling of 10 months' basic wages. Similarly, in the *Rashtriya Mill Mazdoor Sangh, Bombay v. Millowners' Association, Bombay & Others*³, the gratuity scheme framed appears to be substantially similar to the one framed in the *Bharatkhand Textile Mfg. Co., Ltd.*¹. These decisions merely show that 15 days' basic wages has been adopted as a rate by some of the gratuity schemes framed by Industrial Tribunals. We would, however, not be prepared to accept Mr. Kapur's contention that these decisions support the general argument that invariably the rate of 15 days' basic wages must be adopted. That is a question which has to be decided by the Tribunal on the facts of each case; and though it may be desirable that gratuity schemes framed in the same industry in the same region should not disclose radical or violent differences, it would not be possible to introduce uniformity by accepting the argument that 15 days should be treated as the invariable rate in the gratuity schemes. On the material adduced before us, we are not prepared to hold that the basis adopted by the award under appeal has made either a violent or radical departure from the pattern prevailing in the same industry in the Punjab or is otherwise unjustified on the merits. The fact that we decline to interfere with the rate prescribed by the award under appeal does not also mean that according to us, that rate should be adopted in other cases without reference to the relevant facts in each of them.

The result is, the award is modified by prescribing a ceiling of 15 months' basic wages. The rest of the award is confirmed. There would be no order as to costs.

K.S.

Award modified.

1. (1960) 3 S.C.R. 329.

2. (1959) 2 L.L.J. 107 at p. 119.

3. 11 F.J.R. 372.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, K. N. WANCHOO AND J. C. SHAH, JJ.

Abinash Chandra Bose

.. Appellant*

v.

Bimal Krishna Sen and another

.. Respondents.

Criminal Procedure Code (V of 1898), section 411—Appeal against acquittal—High Court if can order re-trial to enable complainant who was not denied the opportunity to adduce further evidence—Accused a lawyer—If makes any difference.

Where in spite of the accused putting it pointedly to the complainant in the cross-examination that a document placed before the Court (an alleged letter by the accused) was a forgery the complainant did not take any steps to get an expert on handwriting examined and the trial Court on an examination of the evidence came to the conclusion that the case against the accused had not been proved and acquitted him, on appeal it was open to the High Court to take a different view of the evidence, if the facts and circumstances placed before it could lead to the conclusion that the appreciation of the evidence by the trial Court was so thoroughly erroneous as to be wholly unacceptable to the Appellate Court. If the High Court could come to that conclusion, it could have reversed the judgment and converted the order of acquittal into an order of conviction. But it should not have put the accused to the botheration and expense of a second trial simply because the prosecution did not adduce all the evidence that should and could have been brought before the Court of first instance. Simply because the accused happened to be a lawyer would not be a ground for subjecting him to harassment a second time, there being no reason for holding that the prosecutor had not a fair chance of bringing the charge home to him. The High Court in the appeal against acquittal was not sitting on a disciplinary proceeding for professional misconduct. It had to apply the same rules of criminal jurisprudence as apply to all criminal trials. There was no relationship of lawyer and client so far as the criminal case was concerned.

Appeal from the Judgment and Order dated the 21st December, 1960 of the Calcutta High Court in Criminal Appeal No. 423 of 1958.

P. K. Chakravarti, Advocate, for Appellant.

S. C. Mazumdar, Advocate, for Respondent No. 1.

D. N. Mukherjee, Advocate, and *P. K. Mukherjee*, Advocate for *P. K. Bose*, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

Sinha, C.J.—This appeal, on a certificate of fitness granted by the High Court under Article 134 (1) (c) of the Constitution, is directed against the order of a Division Bench of the Calcutta High Court, dated 21st December, 1960, setting aside the order of acquittal passed by the trial Magistrate, dated 2nd July, 1958. We heard this appeal on the eve of the long vacation and pronounced our order to the effect that the appeal was allowed and the order of acquittal was to stand, and that reasons would be given later.

It appears that the appellant, who is a practising lawyer, had been employed by the respondent to work for him to investigate the title to some property which the latter was about to purchase, sometime in October, 1952. The prosecution case was that the respondent had entrusted the sum of Rs. 5,000 to the appellant for depositing in Court in connection with an application in respect of the proposed transaction, under the Bengal Money-Lenders' Act, and that the appellant having, been so entrusted with the money, in breach of trust, misappropriated the amount thus causing loss to his client. The appellant was, therefore, charged under section 409 of the Indian Penal Code, with having committed criminal breach of trust in respect of the sum of Rs. 5,000, which had been entrusted to him as a lawyer on behalf of the respondent. The appellant's defence was that the case against him was false and that he had been falsely implicated for reasons which need not be stated.

In order to substantiate the charge against him, the complainant (now respondent) examined himself and a number of witnesses. He also adduced in evidence a certain document, marked Exhibit I, purporting to be a letter in the handwriting of the appellant, to show that Rs. 4,200 being a portion of the amount of Rs. 5,000 required for the deposit had been asked for by the appellant. It also contained writings in the hand of the complainant showing that there was correspondence in the matter of the deposit. That was a very important piece of evidence, which if genuine could go a long way to prove the case against the appellant. But the appellant challenged the document as a forgery in material parts, and cross-examined the complainant who had produced the document. In spite of the fact that the complainant was very pointedly cross-examined with a view to showing that the document placed before the Court was a forgery in material parts, the complainant did not take any steps to get an expert on handwriting examined. The trial Court, on an examination of the evidence, oral and documentary, came to the conclusion that the case against the accused had not been proved and acquitted him. The complainant preferred an appeal to the High Court against the order of acquittal, which was heard by a Division Bench. The High Court took the view that, in the circumstances of the case, there should be re-trial by another Magistrate, who should give an opportunity to the complainant to adduce the evidence of a handwriting expert in order to establish the genuineness of the questioned document. Apparently, the High Court, sitting in appeal on the judgment of acquittal, passed by the learned Magistrate, was not satisfied as to the genuineness of the questioned document. Otherwise it could have pronounced its judgment one way or the other, on the merits of the controversy, whether or not the prosecution had succeeded in bringing the charge home to the accused. If it were not a case between a lawyer as an accused and his client as the complainant, perhaps the High Court may not have taken the unusual course of giving a fresh opportunity to the complainant to have a second round of litigation, to the great prejudice of the accused. In this connection, the following observations of the High Court may be extracted in order to show the reasons for the unusual course it took in this case :

"Thus there can be no doubt that this was a document of considerable importance. According to the prosecution it clearly showed the respondent's connection with the sum of Rs. 4,200 which was a part of the sum of Rs. 5,000, the subject-matter of the charge. According to the respondent, the figures 4,200 and the Bengali word 'sankranta' were forgeries just as at the bottom of the document the word 'yes' and the signature of the respondent with date were also forgeries. This case was clearly put by the respondent to Bimal Krishna Sen and it was suggested to him that the impugned portions of the document were clear forgeries made by the appellant in order to falsely implicate the respondent. It must be said that in spite of this challenge, the appellant took no steps whatever to produce expert evidence to aid the Court in coming to a conclusion as to the authorship of the impugned portion of the document. It is true that expert evidence cannot always be a final settler ; still in a case of this kind, it is eminently desirable that the Court should be assisted by a qualified expert since almost the whole case depends upon proof of the fact whether the impugned portions of that document were in the hand of the respondent. Comment was also made by the Magistrate on the appellant's failure to call expert evidence. In one sense that comment was justified ; but in a case of this kind between lawyer and client we think the matter cannot be left where it is. In view of the fiduciary relationship between the parties it is as much necessary in the interest of the prosecution as in the interest of the accused that the whole matter should be cleared up, and no steps should be spared which might ensure complete justice between the parties. If it were an ordinary case between one litigant and another, we might have hesitated at this distance of time to send the case back even though the prosecution did not avail of the opportunity of proving its own case."

In all civilised countries, criminal jurisprudence has firmly established the rule that an accused person should not be placed on trial for the same offence more than once, except in very exceptional circumstances. In this case, the complainant had the fullest opportunity of adducing all the evidence that he was advised would be necessary to prove the charge against the accused person. It was not that he prayed for the examination of an expert and that opportunity had been denied to him. The prosecution took its chance of having a decision in its favour on the evidence adduced by it before the trial Court. That Court was not satisfied that that evidence was adequately reliable to bring the charge home to the accused. The accused was thus acquitted. On appeal, it was open to the High Court to take a different view of the evidence, if the facts and circumstances placed before it could lead to the con-

clusion that the appreciation of the evidence by the trial Court was so thoroughly erroneous as to be wholly unacceptable to the Appellate Court. If the High Court could come to that conclusion, it could have reversed the judgment and converted the order of acquittal into an order of conviction. But it should not have put the accused to the botheration and expense of a second trial simply because the prosecution did not adduce all the evidence that should, and could, have been brought before the Court of first instance. It is not a case where it is open to the Court of Appeal, against an order of acquittal, to order a re-trial for the reasons that the trial Court has not given the prosecution full opportunity to adduce all available evidence in support of the prosecution case. It has nowhere been suggested that the trial Magistrate had unreasonably refused any opportunity to the prosecution to adduce all the evidence that it was ready and willing to produce. That being so, the High Court, in our judgment, entirely misdirected itself in setting aside the order of acquittal and making an order for a fresh trial by another Magistrate, simply on the ground that the case was between a lawyer and his client. Simply because the accused happened to be a lawyer would not be a ground for subjecting him to harassment a second time, there being no reason for holding that his prosecutor had not a fair chance of bringing the charge home to him. In our opinion, the High Court, gave way to considerations which were not relevant to a criminal trial. The High Court was not sitting on a disciplinary proceeding for professional misconduct. It had to apply the same rules of criminal jurisprudence as apply to all criminal trials, and, in our opinion the only reason given by the High Court for ordering re-trial is against all well-established rules of criminal jurisprudence. The fact that the appellant is a practising lawyer does not entitle him to any preferential treatment when he is hauled up on a criminal charge, even as he is not subject to any additional disability because the case was between a lawyer and his client. There was no relationship of lawyer and client so far as the criminal case was concerned. Hence, in our opinion, the order of re-trial passed by the High Court is entirely erroneous and must be set aside.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, J. L. KAPUR, A. K. SARKAR, M; HIDAYATULLAH AND RAGHUBAR DAYAL, JJ.

The Cement Marketing Co., of India (P.) Ltd. and another .. Appellants*

v.

The State of Mysore and another

— Respondents.

Constitution of India, (1950), Article 286 (1) (before the Sixth Amendment)—Contract of sale involving movement of cement from outside the State for delivery inside the State—Inter-State transactions—No liability to tax.

The tests which have been laid down to bring a sale within inter-State sales are that the transaction must involve movement of goods across the border, and as a result of the sales the goods are actually delivered for consumption in another State.

Before an intending purchaser could obtain cement he had to get what is called an authorisation from a Government authority which nominated the factory from which the intending purchaser had to get his supplies of cement. That authorisation had to be given to the first appellant (The Cement Marketing Co., of India); and after a contract in the standard form was entered into the first appellant sent the order to the factory named in the authorisation and that factory then supplied the requisite goods to the purchaser. The factory from where the cement was to be supplied was not in the hands or the option of the first appellant, but was entirely a matter for the Government authority to decide, so that the cement which was supplied from a particular factory was supplied not at the choice of the first appellant but pursuant to the authorisation.

Under the contract of sale in the instant case there was transport of the goods from outside the State of Mysore into the State of Mysore and the transactions themselves involved movement of the goods across the border. The sales were in the nature of inter-State sales and were exempt from tax.

The first appellant was the exclusive sales Manager of the second appellant and this distinguishes the case from *Rohas Industries Ltd. v. The State of Bihar*, 12 S.T.C. 615, where the relationship was that of seller and buyer.

Appeal from the Judgment and Order dated the 21st March, 1960, of the Mysore High Court in Writ Petition No. 147 of 1958.

R. J. Kolah, Advocate and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, for Appellants.

C. K. Daphtary, Solicitor-General India (*B. R. L. Iyengar* and *P. D. Menon*, Advocates, with him), for Respondents.

The Judgment of the Court was delivered by

Kapur, J.—This is an appeal against the judgment and order of the High Court of Mysore in Writ Petition No. 147 of 1958 dismissing the appellant's petition under Articles 226 and 227 of the Constitution for quashing the order of assessment for the period of assessment 1955-56 *i.e.*, from 1st April, 1955 to 31st March, 1956. In this appeal because of the Validating Act (VII of 1956) the appellants did not challenge their liability for the period 1st April, 1955 to 6th September, 1955.

The facts necessary for the decision of this appeal are these: Appellant No. 1—The Cement Marketing Co., Ltd.—are the Sales Managers of the second appellant—The Associated Cement Co., Ltd.—appointed under an agreement dated 21st April, 1954. The High Court has described the first appellant to be the Distributors of the second appellant. The second appellant is a manufacturer of cement and at the material time it had over a dozen factories in different parts of India, none of which was in the State of Mysore. The head office of the first appellant is at Bombay and it had then a branch office at Bangalore in the State of Mysore. The first appellant was registered as a dealer under the Mysore Salse tax Act, 1948; hereinafter called the "Mysore Act". At all material times cement was and still is a controlled article. Whether the sale was to a Government Department *i.e.*, to the Director-General of Supplies and Disposal, Government of India, New Delhi, or to a person authorised by the said Officer or to the public it was effected on authorisations given to the buyers by appropriate Government authorities and produced by them in the office of the first appellant. Both in regard to purchases by the public and the Government the *modus operandi* was more or less identical. It was this: Every one wishing to buy cement had to get an authorisation in a standard form which authorised the first appellant to sell cement in quantities mentioned therein and the cement had to be supplied from the factory therein mentioned. That document was in the following form which actually relates to a sale to a Government contractor.

"Government of India—Ministry of Commerce & Industry.

Office of the Regional Honorary Cement Adviser, 4/12, Race Course Road, Coimbatore.

Central Quota

Dated 8th October, 1955.

Authorisation No. RA/CT/28/GMI/172 (CQ. CENTELEC)

Period IV/55

The Cement Marketing Co. of India

Name of Suppliers :

P. Box No. 613,

Sugar Company Building, Bangalore-2.

Your are authorised to sell cement in quantity mentioned below under this authorisation. The sale will be a direct deal between yourself and the purchaser. The Government undertakes no responsibility of any nature whatsoever :—

Name and address of the person in whose favour authorisation is issued.	Name of the cement factory or company required to supply cement.	Quantity	Name of Rly. Stn. to which cement is to be booked.	Remarks.
(1)	(2)	(3)	(4)	(5)
M/s. G. S. Duggal & Co., Ltd., Engineers & Contractors, Jalhalli, P.O. Bangalore.	Madhukkarai Shahabad.	300 tons ..	Bangalore	

Ref : No. J/117/115, date 29th September, 1955, from the above indentors—For manufacture of tiles for the Bharat Electronics Ltd. Supply recommended by the Commander Works Engineers (B.E.I.P.), Jalahalli.

Full details of the purpose for which and the place at which cement will actually be consumed; Priority, Defence Work.

(Sd.) C. G. Ramnath,

Copy to :

Reg. Hon. Cement Adviser (Coimbatore.)

1. The indenter.
2. The Dy. Development Officer, Govt. of India, Ministry of Commerce & Industry, Development Wing, (Chemicals I, Mineral Industries), Shahajehan Road, New Delhi.
3. The Controller of Civil Supplies in Mysore, Bangalore, for information."

This authorisation was subject to the following conditions : It was to be utilised within 15 days ; the cement released could be used only for the purpose for which it was given ; the authorisation was not transferable ; the authority could, if necessary, revoke the authorisation at any time and even the orders booked under the authorisation could be cancelled. The purchaser or the indenter had then to place an order with the first appellant as Sales Managers of the second appellant stating the requirement, where the goods were to be sent and how they were to be sent. The seller entered into a contract with the first appellant. This contract is in a standard form and gives conditions of sale. Thereupon the first appellant instructed its Bombay office to despatch the cement in accordance with the instructions of the buyer and the authorisation. In this letter they had to mention the number of the authorisation and the person who had issued it and also to whom the goods were to be sent and how and certain other details which are not necessary for the purposes of this appeal were also to be given.

Each instruction indicates that it was issued for and on behalf of appellant No. 2 by appellant No. 1 as its Sales Managers. A copy of the letter of instruction was sent to the factory from where the goods were to be despatched and the particulars of the authorisation had to be mentioned therein. Thereafter the first appellant sent an advice to the purchaser enclosing there with the Railway Receipt for the goods and this advice also mentioned the particulars of the authorisation against which the goods were being sent. Both the contract of sale and the advice above mentioned stated that the goods were being despatched at the buyer's risk from the time the delivery was made by the factory to the carriers and the railway receipt was obtained for the goods. In the present case all the goods were sent, as indeed they had to be sent against the authorisations from the various factories belonging to the second appellant which at the relevant time were all situate outside the State of Mysore and were received in the State of Mysore by the various sellers.

The position of the first appellant is as was accepted by the Sales Tax Officer in his order dated 31st March, 1958, that of Sales Managers of the second appellant but in regard to the nature of the transactions the Sales Tax Officer found :—

"Though the property in the goods pass to the dealers and consumers outside the State immediately the goods are handed over to the carriers outside the State and railway receipt is taken out since the goods have actually been delivered in Mysore State as a direct result of such sale for purposes of consumption in the State, sale is deemed to have taken place in Mysore State"

and again he said :—

"Thus the sales of cement manufactured by A. C. C. Factories situated outside Mysore State effected by the dealers M/s. Cement Marketing Company of India Ltd., Bangalore, to dealers and customers in Mysore State amounts to intra-State sales and therefore liable to Mysore Sales Tax Act 48."

In its judgment the High Court took into consideration the fact that the first appellant had a branch office at Bangalore within the State of Mysore and that the public placed their orders with the first appellant for supplies of cement against permits granted to them ; that the first appellant, who after accepting the offer for the supplies of cement, collected the price from the intending purchasers and then

directed one of the factories of the second appellant to supply cement to the purchasers and actual delivery to the purchaser was within the State of Mysore and therefore the contention that cement was loaded outside the State of Mysore and despatched to the purchaser did not convert sales into inter-State sales but were intra-State sales. It appears that the true nature of the transaction was not correctly considered by the High Court.

The *modus operandi* above mentioned shows that before an intending purchaser could obtain cement he had to get what is called an authorisation from a Government authority which nominated the factory from which the intending purchaser had to get his supplies of cement. That authorisation with an order had to be given to the first appellant; and after a contract in the standard form was entered into the first appellant sent the order to the factory named in the authorisation and that factory then supplied the requisite goods to the purchaser. The factory from where the cement was to be supplied was not in the hands or at the option of the first appellant, but was entirely a matter for the Government authority to decide, so that the cement which was supplied from a particular factory was supplied not at the choice of the first appellant but pursuant to the authorisation.

It was contended that the sales which took place in the present case in which the movement of goods was from one State to another as a result of a covenant or incident of the contract of sale fell within Article 286 (2) of the Constitution and therefore the imposition of sales tax on such sales was unconstitutional. The Article applicable at the relevant time *i.e.* before its amendment was as follows:—

Section 286.—(1) “No law of a State shall impose or authorise the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) outside the State;

(b) in the course of the import of the goods into or export of the goods out of, the territory of India.

Explanation.....

(2) Except in so far as Parliament may by law otherwise provide, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase takes place in the course of inter-State trade or commerce:

Provided.....

The Article has since been repealed and another substituted in its place by the Constitution (Sixth Amendment) Act but the sales in question were prior to the amendment.

In the present case the contract itself involved the movement of goods from the factory to the purchaser *i.e.* across the border from one State to another because the factories were outside the State of Mysore and therefore transactions were clearly transactions of sale of goods in the course of inter-State trade or commerce. Taking the nature of the transaction and preliminaries which are necessary for the sale or purchase of cement it cannot be said that the sale itself did not occasion the movement of goods from one State to another. The essential features of the contracts proved in the present case are analogous to those in *Messrs. Mohan Lal Hargovind v. The State of Madhya Pradesh*¹. In that case the assesseees were a firm carrying on business of making and selling biris in Madhya Pradesh. In the course of their business they imported finished tobacco from dealers in Bombay State, rolled it into biris and exported the biris to various other States. Both the exporters of tobacco from Bombay State who supplied the assesseees and the assesseees were registered dealers under the C.P. & Berar Sales Tax Act, 1947. It was held that the assesseees imported the finished tobacco into Madhya Pradesh from persons who were carrying on in the State of Bombay business of processing tobacco and selling the goods and there was, as a result of these transactions movement of goods from the State of Bombay to the State of Madhya Pradesh and therefore the transactions involved movement of goods across the State border and they were not liable to be taxed by virtue of Article 286

1. (1956) 1 M.L.J. (S.C.) 5 : (1956) S.C.J. 6 : (1955) 2 S.C.R. 509.

(2) of the Constitution. In *The State of Travancore Cochin and others v. The Bombay Co., Ltd.*¹, which was a case under Article 286 (1) (b) i.e. sale and purchase in the course of export trade, Patanjali Sastri, C.J., observed :—

“A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction”.

At page 1120 the learned Chief Justice again observed :—

“We accordingly hold that whatever else may or may not fall within Article 286 (1) sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India come within the exemption and that is enough to dispose of these appeals.”

Thus a sale to fall within Article 286 (1) (b) has to be a sale which occasions the export. Again in *The State of Travancore Cochin & others v. Shammugha Vilas Cashew Nut Factory and others*², the words “in the course of” were interpreted to mean a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as a part of or connected with such activities. At page 63 the learned Chief Justice explained the words “intergrated activities” as follows :—

“The phrase ‘integrated activities’ was used in the previous decision to denote that ‘such a sale’ (i.e., a sale which occasions the export) ‘cannot be dissociated from the export without which it cannot be effectuated, and the sale and the resultant export form parts of a single transaction’. It is in that sense that the two activities—the sale and the export—were said to be integrated”.

In *Endupuri Narasimham & Sons v. The State of Orissa and others*³, it was held in the case of sales covered by Article 286 (1) (b) that only sale or purchase of goods which occasions the export or import of the goods out of or into the territory of India were exempt from the imposition of tax on the sale or purchase of goods and in regard to prohibition against imposition of tax on inter-State sales the test, it was said, was that in order that a sale or purchase might be inter-State it is essential that there must be transport of goods from one State to another under the contract of sale or purchase. The following observations from the *Bengal Immunity Co., Ltd. v. The State of Bihar and others*⁴, were quoted with approval in support of the proposition :—

“A sale could be said to be in the course of inter-State trade only if two conditions concur : (1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade.”

Thus the tests which have been laid down to bring a sale within inter-State sales are that the transaction must involve movement of goods across the border (*Mohanlal Hargovinds case*⁵ ; transactions are inter-State in which as a direct result of such sales the goods are actually delivered for consumption in another State ; *Messrs. Ram Narain & Sons v. Assistant Commissioner of Sales Tax & others*⁶. A contract of sale must involve transport of goods from one State to another under the contract of sale ; *Bengal Immunity Co.’s case*⁴. In the case of sales in the course of export or import the test laid down was a series of integrated activities commencing from an agreement of sale and ending with the delivery of goods to a common carrier for export by land or by sea ; *The Bombay Co., Ltd. case*¹. “In the course of” was explained to mean a sale taking place not only during the activities directed to the end of the exportation of the goods out of the country but also as part of or connected with such activities and “integrated activities” was explained in similar language. This Court again accepted these tests in *Endupuri Narasimham’s case*³. In section 3 of the Central Sales Tax Act, (LXXIV of 1956) the Legislature has accepted the principle governing inter-State sales as laid down in *Mohanlal Hargovind’s case*⁵. The principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce outside the State are :—

1. (1953) 1 M.L.J. 1 : (1952) S.C.J. 527 : 1952 S.C.R. 1112.

2. (1953) 2 M.L.J. 123 : (1953) S.C.J. 471 : 1954 S.C.R. 53.

3. (1962) 1 M.L.J. (S.C.) 32 : (1962) 1 An. W.R. (S.C.) 32 : (1962) 1 S.C.J. 54 : (1962) 1 S.C.R. 314.

4. (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672 : (1955) 2 S.C.R. 603, 784-5.

5. (1956) 1 M.L.J. (S.C.) 5 : (1956) S.C.J. 6 : (1955) 2 S.C.R. 509.

6. (1955) 2 M.L.J. (S.C.) 302 : (1955) S.C.J. 808 : (1955) 2 S.C.R. 483, 504.

"Section 3.—A sale or purchase of goods shall be deemed to take place in the course of inter-State trade or commerce if the sale or purchase—

(a) occasions the movement of goods from one State to another or

(b) is effected by a transfer of documents of title to the goods during their movement from one State to another."

In, *Tata Iron & Steel Co., Ltd., Bombay v. S. R. Sarkar and another*¹ Shah, J., in explaining what sales are covered by clause (a) of section 3 above said :

"Clause (a) of section 3 covers sales, other than those included in clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State."

As stated above under the contracts of sale in the present case there was transport of goods from outside the State of Mysore into the State of Mysore and the transactions themselves involved movement of goods across the border. Thus if the goods moved under the contract of sale, it cannot be said that they were intra-State sales. It was not the volition of the first appellant to supply to the purchaser the goods from any of the factories of the second appellant. The factories were nominated by the Government by authorisations which formed the basis of the contract between the buyer and the seller. Applying these tests to the facts of the present case we are of the opinion that the sales were in the nature of inter-State sales and were exempt from sales tax. In these circumstances the contracts of sale in the present case have been erroneously considered to be intra-State sales.

The decision in *Rohtas Industries Ltd. v. The State of Bihar*², to which reference was made by the respondent does not apply to the facts of the present case because the agreement between the first appellant and the second appellant is different from that which existed between Rohtas Industries Ltd. and the Cement Marketing Co., of India in the case above cited. On an examination of the agreement between those two companies this Court held that the relationship which existed between the two was of seller and buyer and not of principal and agent. In the present case the agreement is quite different. In the first clause of the agreement between the two appellants and the Patiala Cement Co., dated 21st April, 1954, the first appellant was appointed the sole and exclusive Sales Manager of the second appellant and as such the first appellant was entitled to enter into contracts of sale, receive payment of the same and do all acts and things necessary for the effective management in connection with the contracts of sale entered into on behalf of the principals. The sale price and the terms and conditions of sale were to be determined by the principals. The Sales Manager was to keep its administrative and technical staff at such places in India as was determined by the principals. All the establishment charges and other expenses of the Sales Managers were for and on behalf of the principals and were to be defrayed by the principals in proportion to their annual sales. At the end of every month the Sales Managers were to submit to the principals accounts showing sales contracts by it on behalf of each one of the principals. At the end of each financial year ending 31st July, the Sales Managers had to make a proper account of all their operations during the year and after submitting them for confirmation to the principals had to pay the price of annual sales realizations to each of the principals to whom they happened to relate. Clause 10 provided that subject to instructions of the principals the Sales Managers were to make all necessary arrangements to secure speedy and economical transport of cement. These terms are quite different from those in the case of *Rohtas Industries Ltd.*², and therefore that decision has no application to the facts of the present case.

In the result the imposition of the sales tax on the appellant for the year of assessment except for the period 1st April, 1955 to 6th September, 1955, was illegal and was not leviable for that period. The appeal is therefore allowed to that extent and the writ petition of the appellants succeeds but it will not affect the tax paid for the period above mentioned. In view of the partial success of the appellants they will be entitled to half costs of the appeal.

V.S.

Appeal partly allowed.

1. (1961) 1 S.C.R. 379 at 391.

2. 12 S.T.C. 615.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, P. B. GAJENDRAGADKAR, K. N. WANCHOO, K. C. DAS GUPTA AND J. C. SHAH, JJ.

Union Territory of Tripura and another

.. Appellant*

Gopal Chandra Dutta Choudhuri

.. Respondent.

Constitution of India (1950), Article 311—Protection under—Applicable to temporary public servant—State reserving right to terminate services by terms of employment—Bona fide termination in exercise of such right—No right to protection under Article 311—Onus of proof—Enquiry by Court—Not similar to that under section 33 of Industrial Disputes Act (XIV of 1947).

A public servant holds a civil office during the pleasure of the President or the Governor of the State according as he holds office under the Union or the State. But to protect public servants, a dual restriction is placed upon the exercise of the power to terminate the employment. A public servant cannot be dismissed or removed by an authority subordinate to that by which he was appointed and he cannot be dismissed or removed or reduced in rank until he has been given reasonable opportunity of showing cause against the action proposed to be taken in regard to him. These protections undoubtedly apply to temporary public servants as well as to public servants holding permanent employment. But the State is not prohibited by the Constitution from reserving a right by the terms of the employment to terminate the services of public servants, and if in the *bona fide* enforcement of that right the employment is terminated the protection under Article 311 of the Constitution will not avail him, because such a termination does not amount to dismissal or removal from service.

But the State may instead of exercising its contractual right seek to terminate the employment even of a temporary employee for misconduct, negligence, inefficiency or any other disqualification and when an order of termination of employment is passed for that purpose it would amount to dismissal or removal attracting the protection of Article 311 of the Constitution.

The form in which the order is couched is not always decisive. It cannot be assumed that an order *ex facie* one of termination of employment of a temporary employee was intended to be one of dismissal. The onus to prove that such was the intention of the authority terminating the employment must lie upon the employee concerned.

The principle under the Industrial Disputes Act dealing with the termination of employment of workmen and the authority of the Tribunal to grant permission to terminate such employment evolved in the context of maintenance of industrial peace has no relevance in deciding whether the aggrieved public servant was by the impugned order denied the protection of the constitutional guarantee. There is no similarity between the enquiry made under section 33 of the Industrial Disputes Act and enquiry made by the Court where the order of dismissal of a public servant is impugned.

Appeal from the Judgment and Order dated the 15th January, 1960, of the Judicial Commissioner's Court Tripura at Agartala in Civil Misc. (Writ Petition) No. 4 of 1959:

R. Ganapathy Iyer and P. D. Menon, Advocates for Appellants.

D. P. Singh, Advocate of M/s. Ramamurthi & Co., for Respondent.

The Judgment of the Court was delivered by

Shah, J.—This is an appeal with a certificate granted by the Judicial Commissioner of Tripura under Article 132 (1) of the Constitution.

Gopal Chandra Dutta Choudhuri—hereinafter referred to as 'the respondent'—was appointed a Constable in the Police Force of Tripura by the Superintendent of Police, Agartala, by order dated 18th April, 1954. The employment was temporary and was liable to be terminated with one month's notice. On 6th December, 1957, the Superintendent of Police, acting under rule 5 of the Central Services (Temporary Service) Rules, 1949, informed the respondent that his services "will be terminated with effect from 6th January, 1958 A.M.". The respondent presented an appeal to the Chief Commissioner against the order of termination. By letter dated 11th April, 1958, the respondent was informed that as he was "an ex-convict for theft, nothing can be done for him". In reply to another application addressed to the Chief Commissioner the respondent was informed by letter dated 26th May, 1958, that he was already informed in connection with his previous appeal that as he was

"an ex-convict in a case of theft" he "cannot be re-employed by the Administration".

The respondent then filed in the Court of the Judicial Commissioner, Tripura, a petition for a writ under Article 226 of the Constitution praying for a writ declaring that the order of the Superintendent of Police terminating his services was "illegal" and for a writ of *mandamus* or a writ of *certiorari* directing the Chief Commissioner not to enforce the said order and for an order reinstating him in the Police Force of the Tripura Administration with retrospective effect. The Tripura Administration submitted in rejoinder that the respondent being a temporary employee of the Police Force, his services were lawfully terminated under rule 5 of the Central Civil Services (Temporary Service) Rules, 1949. The Judicial Commissioner of Tripura held that the respondent was a temporary employee, but the order terminating the respondent's employment was invalid for it infringed the constitutional guarantee of protection of public servants under Article 311, which applied to temporary as well as permanent public servants. In the view of the Judicial Commissioner, termination of employment of a temporary servant governed by the Central Civil Services (Temporary Service) Rules, 1949, will not *per se* be treated as a punishment or dismissal or removal, but it is open to the Court even if an order merely of termination of employment of a temporary employee is passed to ascertain whether the order was intended to be one of termination *simpliciter* or of dismissal entailing penal consequences, and that the order dated 11th April, 1958, of the Chief Commissioner passed in appeal clearly indicated that the order of the Superintendent of Police was one imposing penalty. He observed :

"this reply (dated 11th April, 1958) will clearly indicate that though the Superintendent of Police purported to terminate his services under the Central Civil Services (Temporary Service) Rules, he meant to dismiss the petitioner from service as a punishment on the ground that he was an ex-convict and that it was intended that he should not be re-appointed in future in any department of the Government. Thus it cannot be gainsaid that the termination was in fact a punishment for previous misconduct debarring the petitioner from being employed even in the future, and that in passing the innocuous order (dated 6th December, 1957, Annexure D), the Superintendent was really camouflaging his real intention. The real intention came to light, perhaps as the result of an oversight in communicating the orders in appeal to the petitioner".

We are unable to agree with the Judicial Commissioner that the termination of employment of the respondent by the Superintendent of Police by order dated 6th December, 1957, was in violation of Article 311 (2) of the Constitution. It is true that before the respondent was discharged from service no enquiry was made as to any alleged misconduct, nor was he given any opportunity of showing cause against the proposed termination of employment. But it is well settled that when employment of a temporary public servant, is terminated pursuant to the terms of a contract, he is not entitled to the protection of Article 311 (2). As observed in *Parshotam Lal Dhingra v. The Union of India*¹, by Das, C.J. :

"a termination of service brought about by the exercise of a contractual right is not *per se* dismissal or removal, as has been held by this Court in *Satish Chander Anand v. The Union of India*². . . . the termination of the service did not carry with it the penal consequences of loss of pay, or allowances under the rule 52 of the Fundamental Rules".

But the State may instead of exercising its contractual right seek to terminate the employment even of a temporary employee for misconduct, negligence, inefficiency or any other disqualification, and when an order of termination of employment is passed for that purpose it would amount to dismissal or removal attracting the protection of Article 311 of the Constitution. The form in which the order is couched is not always decisive. In *Parshotam Lal Dhingra's case*¹, it was observed (at page 863) :

"the use of the expression 'terminate' or 'discharge' is not conclusive. In spite of the use of such innocuous expressions, the Court has to apply the two tests mentioned above,

namely, (1) whether the servant had a right to the post or the rank or (2) whether he has been visited with evil consequences of the kind hereinbefore referred to. If the case satisfies either of the two tests then it must be held that the servant has been punished and the termination of his service must be taken as a dismissal or removal from service or the reversion to his substantive rank must be regarded as a reduction in rank and if the requirements of the rules and Article 311, which give protection to Government servant have not been complied with, the termination of the service or the reduction in rank must be held to be wrongful and in violation of the constitutional right of the servant".

The question which falls to be determined is, whether the Superintendent of Police by order dated 6th December, 1957, passed an order in truth one of dismissal for misconduct, negligence, inefficiency or like cause or he enforced the contractual right of the State to terminate the employment of the respondent who was a temporary employee. The order in terms merely terminates the service of the respondent : it was not preceded by any enquiry for ascertaining whether the respondent was guilty of any misdemeanour, misconduct, negligence, inefficiency or a similar cause. In the order on appeal filed to the Chief Commissioner it is recited that the respondent was "an ex-convict for theft and therefore nothing could be done for" him, but the purport thereof is somewhat obscure. The memorandum of appeal filed before the Chief Commissioner was not tendered in evidence, and there is nothing in the order suggesting that the employment of the respondent was terminated because he had, before he was employed on 18th April, 1954, been convicted by a Criminal Court for theft. It appears from the order of the Chief Commissioner dated 26th May, 1958, that the respondent had applied for re-employment in the Police Force and the Chief Commissioner was of the opinion that because the respondent was "an ex-convict in a case of theft" he could not be re-employed. There is no ground for inferring that the Superintendent of Police was seeking to camouflage an order of dismissal by giving it the form of termination of employment in exercise of the authority under rule 5 of the Central Civil Services (Temporary Service) Rules. It cannot be assumed that an order *ex facie* one of termination of employment of a temporary employee was intended to be one of dismissal. The onus to prove that such was the intention of the authority terminating the employment must lie upon the employee concerned : but about the intention of the Superintendent of Police there is no evidence except the order of that authority.

Counsel for the respondent urged that as in an application made under section 33 of the Industrial Disputes Act for permission of an Industrial Tribunal to discharge workmen pending adjudication of the dispute in which the employer or the workmen are concerned, the Tribunal is bound to enter upon a full investigation and ascertain whether the employer had acted *mala fide* or that the order of discharge amounted to an unfair labour practice or that it was a case of victimisation, the Court in making an enquiry where the order of termination of employment of a temporary public servant was merely one in enforcement of a contractual right or an attempt to dismiss an employee because of misconduct, negligence or inefficiency, is also obliged to enter upon a critical investigation of the reasons which induced the authority to make the impugned order. Counsel invited our attention to the decision of this Court in *The Chartered Bank, Bombay v. The Chartered Bank Employees' Union*¹, and *The Management of Chandramalai Estate, Ernakulam v. Its Workmen and another*², and submitted that the considerations which were material in deciding an application under section 33 of the Industrial Disputes Act were also relevant in adjudging the true nature of the order terminating employment of a public servant. In considering an application under section 33 of the Industrial Disputes Act the Tribunal has, it is true,

"to go into all the circumstances which led to the termination *simpliciter* and the employer cannot be permitted to say that he is not bound to disclose the circumstances before the Tribunal. The form of the order is not conclusive of the true nature of the order, for it is possible that the form may be merely a camouflage for an order of dismissal for misconduct. It is therefore always open to the Tribunal to go behind the form and look at the substance ; and if it comes to the

conclusion, for example, that though in form the order amounts to termination *simpliciter* it in reality cloaks a dismissal for misconduct it will be open to it to set it aside as a colourable exercise of the power".

But in our view the principle of these cases under the Industrial Disputes Act dealing with termination of employment of workmen and the authority of the Tribunal to grant permission to terminate such employment evolved in the context of maintenance of industrial peace, has no relevance in deciding whether the aggrieved public servant was by the impugned order denied the protection of the constitutional guarantee. A public servant holds a civil office during the pleasure of the President or the Governor of the State according as he holds office under the Union or the State. But to protect public servants a dual restriction is placed upon the exercise of the power to terminate employment. A public servant cannot be dismissed or removed by an authority subordinate to that by which he was appointed and he cannot be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. These protections undoubtedly apply to temporary public servants as well as to public servants holding permanent employment. But the State is not prohibited by the Constitution from reserving a right by the terms of employment to terminate the services of public servant, and if in the *bona fide* enforcement of that right the employment is terminated the protection of Article 311 of the Constitution will not avail him, because such a termination does not amount to dismissal or removal from service. In *The Punjab National Bank Ltd. v. Its Workmen*¹, this Court pointed out that there was a substantial difference between the consequences of non-compliance with section 33 of the Industrial Disputes Act and Article 311 (2) of the Constitution. Compliance with section 33 only avoids a penalty under section 31 (1) while compliance with Article 311 (2) makes the order of dismissal final. In a proceeding under section 33 of the Industrial Disputes Act the Tribunal is concerned only to make a limited enquiry whether the proposal to terminate the employment of a workman was *prima facie*, *bona fide* or whether the employer was guilty of victimisation or any unfair labour practice. The Tribunal has merely

"to consider the *prima facie* aspect of the matter, and either grant it or refuse it according as it holds that *prima facie* case is or is not made out by the employer. * * * The effect of the permission given by the Tribunal is only to remove the ban imposed by section 33 of the Industrial Disputes Act. The Tribunal can neither validate a dismissal nor prevent it from being challenged in an industrial dispute; in such a dispute when raised the employer may justify his action only on such grounds as were specified in the original charge-sheet and no others".

Before terminating the employment of a public servant sanction of the Court is not necessary. The order of termination of employment operates *pro prio vigore* and is not made justiciable. The validity of such an order may be challenged only on the ground that the constitutional protection prescribed by Article 311 and the Rules made under Article 309 was denied to the public servant concerned. There is no similarity between the enquiry made under section 33 of the Industrial Disputes Act and an enquiry made by the Court where the order of dismissal of a public servant is impugned. The Court in dealing with the case of a public servant only adjudicates upon the validity of the act of the authority concerned: the Court is not called upon to sanction a proposed dismissal. The enquiry to be made by the Court is restricted to the observance of the rules prescribed by the Constitution. It would, therefore, be impossible to assimilate the content of an enquiry contemplated to be made under section 33 of the Industrial Disputes Act before granting permission to terminate employment of a workman into the enquiry to be made by the Civil Court, when the public servant claims that he is denied the protection under Article 311 or that his employment has been terminated in violation of rules framed under Article 309 of the Constitution.

The appeal must therefore be allowed and the petition filed by the respondent dismissed. There will be no order as to costs throughout.

V.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

The Union of India

.. *Appellant**

v.

The Birla Cotton Spinning and Weaving Mills Ltd.

.. *Respondent*.

Arbitration Act (X of 1940), section 34—Arbitration clause in contract agreeing to refer dispute "in connection with the contract"—Construction—Refusal to pay amount due—If dispute "in connection with the contract."

A plea that the defendant though liable to pay the amount under the terms of the contract will not pay it because it desires to appropriate it towards another claim under another independent contract cannot reasonably be regarded as a dispute "under or in connection" with that contract under which liability sought to be enforced has arisen. In such a case an order for stay of proceedings under section 34 of the Arbitration Act cannot be made.

Appeal by Special Leave from the Judgment and Order dated 12th April, 1960, of the Punjab High Court (Circuit Bench) at Delhi in First Appeal from Order No. 43-D of 1960.

N. S. Bindra, Senior Advocate, (R. H. Dhebar, Advocate, with him), for Appellant.

G. B. Pai, Advocate, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The Birla Cotton Spinning and Weaving Mills Ltd.—hereinafter called 'the Company'—supplied to the Union of India goods of the value of Rs. 1,06,670-89 nP. under a contract dated 30th January, 1956 and received Rs. 93,727 as part payment of the price. The Union declined to pay the balance of Rs. 12,943-80 nP. The Company then commenced Suit No. 386 of 1958 in the Court of the Senior Subordinate Judge, Delhi, against the Union of India for a decree for Rs. 10,625 and Rs. 2,762-50 nP. as interest from 12th October, 1956, till date of suit with interest *pendente lite* and costs of the suit. The Company alleged that the Union had withheld payment of the balance of Rs. 12,943-89 nP. on the plea that an amount of Rs. 10,625 was due to the Union under another contract between the parties for a bulk purchase Order No. PBI/7028-705 dated 16th December, 1949. The Company submitted that there was no such contract and the dispute raised in that behalf by the Union had been referred to the arbitration of the Officer on Special Duty, Directorate-General of Supplies and Disposals and Shri Ramniwas Agrawala but had since been adjourned *sine die* by the arbitrators.

The Union by petition dated 19th May, 1959, applied under section 34 of the Indian Arbitration Act for stay of the suit alleging that a dispute had arisen between the parties and there being an arbitration agreement which could be invoked under the circumstances and the Union being ready and willing to do all things necessary for the proper conduct of the arbitration under clause 21 contained in Form No. WSB-133. The Company resisted the petition contending that there was no dispute concerning the contract which was covered by any valid submission or arbitration clause, and which attracted the application of section 34 of the Arbitration Act. The Subordinate Judge held that before section 34 could be invoked the suit must raise a dispute in respect of the matter agreed to be referred to arbitration and not independent of it and as no dispute was raised by the Union about its liability to pay the amount claimed by the Company arising under the contract and the only dispute which was sought to be raised was in respect of the liability of the Company under another contract, the suit could not be stayed. An appeal against the order refusing to stay the suit was dismissed *in limine* by the High Court of Punjab. With Special Leave the Union has appealed to this Court.

The only contention raised in the appeal is that the terms of the arbitration agreement include a dispute relating to a refusal to meet the obligations arising under the contract even though the refusal was not founded on any right arising under the terms of the contract. The arbitration agreement is contained in clause 21, which in so far as it is material provides :

" In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matters the decision of which is specially provided for by these conditions) the same shall be referred to the award of an arbitrator to be nominated by the Purchaser and an arbitrator to be nominated by the Contractor, or in case of the said arbitrators not agreeing then to the award of an Umpire to be appointed by the arbitrators in writing before proceeding on the reference and the decision of the arbitrators, or in the event of their not agreeing of the Umpire appointed by them shall be final and conclusive and the provisions of the Indian Arbitration Act, 1940, and of the Rules thereunder and any Statutory modification thereof shall be deemed to apply to and be incorporated in this contract."

The arbitration clause is wide and includes not only disputes arising under the covenants of the contract but also to disputes under conditions general or special in connection with the contract. But before an order for stay of a proceeding may be made under section 34 of the Arbitration Act, the following conditions must co-exist :

(i) there must be a subsisting and binding arbitration agreement capable of being enforced between the parties ;

(ii) the subject-matter in dispute in the proceeding sought to be stayed must be within the scope of the arbitration agreement ; and

(iii) the petition must be made to the judicial authority by a party to the arbitration agreement or some person claiming under him at the earliest stage of the proceeding i.e., before the filing of the written statement or taking any other step in the proceeding.

The judicial authority may, if these conditions exist, grant stay, if it is satisfied that the party applying is and has also been at all material times before the proceedings were commenced ready and willing to do all things necessary for the proper conduct of the arbitration and there is no sufficient reason for not referring the matter in accordance with the arbitration agreement.

The evidence recorded by the Trial Court discloses that there was no dispute between the Company and the Union arising under the contract on which the suit was filed. The Union accepted liability to pay the amount claimed by the Company in the suit. The Union still declined to pay the amount asserting that an amount was due from the Company to the Union under a distinct contract. This amount was not sought to be set-off under any term of the contract under which the Company made the claim. The dispute raised by the Union was therefore not in respect of the liability under the terms of the contract which included the arbitration clause, but in respect of an alleged liability of the Company under another contract which it may be noted had already been referred to arbitration. The Union had no defence to the action filed by the Company : it was not contended that the amount of Rs. 10,625 was not due to the Company under the contract relied upon by the Company. For enforcement of the arbitration clause there must exist a dispute : in the absence of a dispute between the parties to the arbitration agreement, there can be no reference.

It was urged that mere refusal by the Union to pay the amount due is sufficient to raise a dispute " in connection with the contract " within the meaning of clause 21 of the Arbitration agreement. We are unable to agree with that contention. A dispute that the Union is not liable to pay the price under the terms of the contract is undoubtedly a dispute under the contract, and in any event in connection with the contract. But a plea that the Union though liable to pay the amount under the terms of the contract will not pay it because it desires to appropriate it towards another claim under another independent contract cannot reasonably be regarded as a dispute " under or in connection " with that contract under which the liability sought to be enforced has arisen.

The decision of the Calcutta High Court in *Uttam Chand Saligram v. Jawa Mamooji*¹, on which reliance was placed by the Union does not, in our judgment, support any such proposition. In that case an award of the arbitrator was chal-

lenged on the ground that it was without jurisdiction, there being no dispute between the parties, the party applying having admitted his liability under the contract. Rankin, J., held that though the existence of a dispute was an essential condition for the arbitrator's jurisdiction, the dispute may be either in the acknowledgement of the debt or as regards the mode and time of satisfying it. In that case the Court held that the defence of the applicant applying for vacating the award was that he was not under any obligation to pay the amount due. This is clear from the observation made on page 540 where the learned Judge observed :

"* * * but in truth the petitioner's later letters to the Chamber, his petition itself in paragraphs 5, 6 and 12, paragraph 6 of the affidavit filed in this behalf in reply all show conclusively that he was withholding payment under a claim of right so to do. That the claim has little substance makes his case so much the worse."

The Union is however not seeking to withhold payment under a claim of right so to do. What the Union contends is that under the contract they are liable to pay the amounts due but they will not pay because they have another claim unrelated to the claim in suit against the Company.

The decision of the Calcutta High Court in *Chundanmull Jhaleria v. Clive Mills Co., Ltd.*¹, on which also reliance was placed does not assist the Union. In that case the Court decided that an arbitration clause in a contract, by which the parties thereto agree to refer their disputes to arbitration, may be wide enough to include a dispute whether the contract itself has or has not been frustrated, but in the present case we are not concerned about any dispute relating to frustration of the contract.

The principle of the decision of the House of Lords in *Heyman and another v. Darwins Ltd.*², on which reliance was placed on behalf of the Union has also no application. It was held in that case that when an arbitration clause in a contract provides without any qualification that any difference or dispute which may arise "in respect of" or "with regard to" or "under the contract" shall be referred to arbitration, and the parties are at one in asserting that they entered into a binding contract, the clause will apply even if the dispute involves an assertion by one party that circumstances have arisen, whether before or after the contract has been partly performed, which have the effect of discharging one or both parties from all subsequent liability under the contract, such as repudiation of the contract by one party accepted by the other, or frustration of the contract. Viscount Simon, L.C., observed in that case :

"An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself also is void. But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen "in respect of", or "with regard to", or "under the contract" and an arbitration clause which uses these, or similar, expressions should be construed accordingly."

But the Union is not seeking to go to arbitration on a dispute between the parties about a breach committed by one side or the other or whether circumstances have arisen which have discharged one or both parties from further performance. It is a case in which in substance there is no dispute between the parties "under", "in connection with", or even "with regard to" the contract. The plea raised by the Union for stay of the suit was frivolous. It is somewhat surprising that the plea should have been raised and persisted in, and even after going to arbitration in the other case have been brought up to this Court involving large costs to the public exchequer.

The appeal therefore fails and is dismissed with costs.

K.S.

Appeal dismissed.

1. I.L.R. (1948) 2 Cal. 297.

2. L.R. (1942) A.C. 356.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—B. P. SINHA, *Chief Justice*, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

S. R. Tewari

.. Appellant*

v.

The District Board, Agra by its Secretary and another

.. Respondents.

Constitution of India (1950), Article 226—Extent and scope of Court's powers in relation to acts of statutory bodies—U. P. District Boards Act (X of 1922), sections 82 and 84—Scope of powers of dismissal and termination of service.

Under the Common Law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well recognised exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 of the Constitution of India (1950) continues to remain in service even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the industrial law jurisdiction of the labour and Industrial tribunals to compel the employer to employ a worker whom he does not desire to employ is recognised. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute even if by making the declaration the body is compelled to do something which it does not desire to do. The jurisdiction to declare the decision of the District Board as *ultra vires* exists, though it may be exercised only when the Court is satisfied that departure is called for from the rule that a contract of service will not ordinarily be specifically enforced.

By section 82 of the District Boards Act, 1922, power of the Board to decide questions arising in respect of the service including the power to punish, dismiss, transfer and control servants of the Board is statutorily delegated to the President in case of servants drawing a salary exceeding Rs. 40 per mensem and to the Secretary for other servants. But the exercise of the power is subject to the conditions prescribed in the provisos. Upon the exercise of the power under section 82 vested in the Board, the President and the Secretary, there is yet another set of restrictions imposed by section 84. The power is subject among others to the rules imposing conditions on the appointment of persons to offices, or to particular office requiring professional skill and on the punishment or dismissal of persons so appointed and to rules relating to servants of the Board. The rule providing for the procedure for termination of employment of servants of the Board is a rule relating to servants of the Board and may properly be made under section 84 (d) read with section 172 (2). Power to appoint ordinarily carries with it power to terminate appointment and a power to terminate may in the absence of restrictions express or implied be exercised subject to the conditions prescribed in that behalf, by the authority competent to appoint. The power to terminate employment is therefore to be found in section 82 and the method of its exercise is prescribed by the rules referred to in section 84. The rules deal with the conditions under which an officer or servant may be dismissed (the dismissal being by way of punishment) and also under which determination of employment may take place.

The expression 'dismissal' in the Fourth Proviso to section 82 does not include termination of employment *simpliciter*. In the law relating to master and servant, the expression dismissal has acquired a limited meaning—determination of employment as a method of punishment for misconduct or other cause. An order of determination of employment which is not of the nature of an order of dismissal, was by virtue of the Rules framed under clause (d) of section 84 to be exercised consistently with rule 3-A and an order of dismissal involving punishment must be made consistently with the rule or regulation framed under section 84 (b) and (d).

Appeal from the Judgment and Decree dated 1st December, 1958, of the Allahabad High Court in Civil Misc. Writ No. 270 of 1956.

S. T. Desai, Senior Advocate, (J. P. Goyal, Advocate, with him), for Appellant.

C. B. Aggarwala, Senior Advocate, (C. P. Lal, Advocate, with him), for Respondent No. 1.

K. S. Hajela, Senior Advocate, (C. P. Lal, Advocate, with him), for Respondent No. 2.

The Judgment of the Court was delivered by

Shah, J.—On 18th October, 1954, the District Board, Agra, resolved to terminate after giving salary for three months in lieu of notice, the employment of the appellant who held the office of Engineer under the Board, and intimation in that behalf was given to him. An appeal preferred by the appellant to the Government of U.P.

against the order terminating his employment was dismissed on 5th December, 1956. The appellant then submitted a petition to the High Court of Allahabad under Article 226 of the Constitution for a writ in the nature of *certiorari* (quashing the resolution passed by the Board on 18th October, 1954 and the order dated 5th December, 1956, passed by the State of U.P. dismissing the appellant's appeal, and a writ in the nature of *mandamus* commanding the Board and the State of U.P. to treat the appellant as the lawfully appointed Engineer of the District Board and not to give effect to the resolution terminating the services of the appellant passed by the Board on 18th October, 1954.

The appellant averred that he had as Engineer of the Board rendered "flawless service" but a member of the Board named Tota Ram felt 'annoyed with' him 'for reasons which had nothing to do with the proper discharge of his duties as an Engineer', and the President of the District Board was not 'very happy with the' appellant for "reasons best known to" the President, that "he had spent the best part of his life in the service of the District Board and even though he has been honest and faithful in the discharge of his duties, the District Board has capriciously and without any justification terminated" his services, and therefore the resolution of the Board terminating his services was invalid.

On behalf of the Board an affidavit was filed stating that the appellant was guilty of "negligence and unfaithfulness", and he was censured, his annual increments were stopped, and that he was once dismissed and thereafter the resolution of dismissal was rescinded. The affidavit catalogued several incidents in support of this case, and urged that the Board being competent had justifiably terminated the appellant's services, and the validity of the resolution terminating his services was not liable to be challenged. The State of U.P. submitted that the services of the appellant were terminated in accordance with rule 3-A (iv) of the District Board Manual, that no appeal lay against the resolution terminating the services of the appellant under rule 3-A (iv) of the Rules regarding Officers and servants of District Boards and that the order of the State Government rejecting the appeal was correct.

The High Court dismissed the petition holding that under the Fourth Proviso to section 82 of the District Boards Act, 1922, the Board had the power to appoint and to determine the employment of an Engineer of the Board and unless the determination was by way of punishment it could be made in the manner provided by rule 3-A clause (iv) after giving notice of three months or a sum equal to salary for three months in lieu of notice. The Court rejected the contention of the appellant that the power to dismiss conferred by the Fourth Proviso to section 82, could only be exercised for punishing a delinquent servant of the Board and after following the procedure prescribed in that behalf, and that apart from the power to dismiss, there was no power vested under the Act to determine employment and consequently the provisions of rule 3-A, clause (iv) were ineffective. Against the order passed by the High Court this appeal is preferred with certificate granted by the High Court.

Counsel for the Board contended *in limine* that the appellant not being a member of the civil service of the State was not entitled to the protection of Article 311 of the Constitution, and the relief claimed by him being in substance one for an order restoring him to the service of the Board from which he was dismissed, the jurisdiction of the High Court even under Article 226 of the Constitution was restricted by section 21 (b) of the Specific Relief Act and that the relief claimed by him cannot in any event be given, the remedy, if any, of the appellant being to claim damages by suit for wrongful termination of employment and not a petition for a writ declaring the termination of employment unlawful, and a consequential order for restoration in service. Reliance was placed in support of this plea upon *Municipal Board, Shahjahanpur v. Sardar Sukha Singh*¹, *Ram Babu Rathaur v. Divisional Manager, Life Insurance Corporation of India and others*² and *Dr. S. B. Dutt v. University of Delhi*³.

1. I.L.R. (1937) All. 434.
2. A.I.R. 1961 All. 502.

3. (1959) S.C.R. 1236 : 1959 S.C.J. 78.

In our judgment none of these cases can be used to support the view that the High Court has no power to declare the statutory obligations of a statutory body. Under the Common Law the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well recognized exceptions. It is open to the Courts in an appropriate case to declare that a public servant who is dismissed from service in contravention of Article 311 continues to remain in service, even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly under the industrial law, jurisdiction of the labour and industrial tribunals to compel the employer to employ a worker, whom he does not desire to employ, is recognized. The Courts are also invested with the power to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making the declaration the body is compelled to do something which it does not desire to do.

The decision of the Allahabad High Court in *Municipal Board, Shahjahanpur v. Sukha Singh*¹, enunciates the law somewhat broadly when it states that the Court has no jurisdiction to force an employer to retain the services of a servant whom he no longer wishes to employ, and every employer is entitled to discharge a servant for whose service he has no need. It must be pointed that the powers of a statutory body are always subject to the statute which has constituted it, and must be exercised consistently with the statute, and the Courts have, in appropriate cases, the power to declare an action of the body illegal or *ultra vires* even if the action relates to determination of employment of a servant. In *Ram Babu Rathaur's case*² the Court had to consider the question whether an employee of the Life Insurance Corporation whose employment was terminated could claim a writ of *mandamus* restoring him to the service of the Corporation, or a writ of *certiorari* quashing the proceeding of the Corporation. The Corporation is an autonomous body and is not a department of the State, and the relation between the Corporation and its employees is governed by contract, and no statutory obligation is imposed upon the Corporation in that behalf. The Court was therefore right in holding that the relationship between the employee and the Corporation had to be determined, in the absence of any statutory provision or a special contract, by the general law of master and servant. In *Dr. S. B. Dutt's case*³, this Court held that an award made by an arbitrator, declaring that the dismissal of an employee of the Delhi University was "*ultra vires, mala fide*, and has no effect on his status. He still continues to be a professor of the University" disclosed an error apparent on the face of the award, because it sought to enforce a contract of personal service. That was again not a case in which the invalidity of an act done by the University on the ground that it infringed a statutory provision fell to be determined. The rights and obligations of the parties rested in contract, and the award of the arbitrator that the dismissal of the employee was "*ultra vires*" was a mere flourish of language, having no meaning in the context of the dispute between the parties. The award was therefore declared to be one contrary to the rule contained in section 21 (b) of the Specific Relief Act and hence void.

The question whether the Court would be justified in granting a declaration about the invalidity of the action of a statutory body terminating the employment of a servant was raised before the House of Lords in *Vine v. National Dock Labour Board*⁴. The plaintiff, a dock worker in the reserved pool, under the scheme set up under the Dock-Workers (Regulation of Employment) Order, 1947, failed to obey an order to report for work with a company of stevedores and the local board instructed their disciplinary committee to hear the case against the plaintiff. The Committee terminated the employment of the plaintiff giving seven days' notice, and this decision was confirmed by the appellate board. The plaintiff then claimed in an action instituted by him a declaration that his purported dismissal was illegal, *ultra vires*, and invalid, and also damages for wrongful dismissal. The Trial Court granted the declaration, and also damages. The Court of Appeal set aside the declaration. The House of Lords restored the declaration, for in their view the purported dis-

1. I.L.R. (1937) All. 434.

2. A.I.R. 1961 All. 502.

3. (1959) S.C.R. 1236 1959 S.C.J. 78.

4. L.R. (1957) A.C. 488.

missal was a nullity, since the local board had no power to delegate its disciplinary functions: *Prima facie*, jurisdiction of the Court in an appropriate case to declare an order passed by a statutory body, even if the order relates to the termination of the employment of a servant of the body, may not be denied.

The contention raised by Counsel for the Board that a petition for a declaration that the employment of the appellant was not lawfully terminated and on that account the Board be commanded to treat the appellant as lawfully in service cannot be maintained, must be rejected. The jurisdiction to declare the decision of the Board as *ultra vires* exists, though it may be exercised only when the Court is satisfied that departure is called for from the rule that a contract of service will not ordinarily be specifically enforced.

The question which then falls to be determined is whether under the District Boards Act, 1922 the Board is invested with the power to determine employment of a servant of the Board otherwise than by way of dismissal as punishment, and for that purpose certain provisions of the Act and the Rules framed under the Act may usefully be referred. Chapter IV deals with officers and servants of the Board. 'Servant' of the Board is defined in section 3 (ii) of the Act as meaning "a person in the pay and service of the board". Section 72 enjoins upon the Board the duty to appoint in addition to the Secretary and the Superintendent of Education such officers or servants as it is required to appoint by Rules. By Chapter IX of the Rules framed under the Act the Board must appoint a District Board Engineer possessing the qualifications specified therein. An Engineer is therefore an officer or servant whom the Board is bound to appoint. Section 82 confers administrative authority upon the President and the Secretary in respect of several matters relating to the servants of the Board specified therein. The section states :

"Except in the cases provided for by sections 70, 71 and 72, the power to decide all questions arising in respect of the service, leave, pay, allowances and privileges of servants of the board, who are employed whether temporarily or permanently, on a monthly salary of more than Rs. 40 and the power to appoint, grant leave of absence to, punish, dismiss, transfer and control such servants of the board, shall vest in the President, and the said powers in the case of all other servants of the board shall vest in the Secretary."

This clause is followed by four provisos, the last of which is material. It provides :

"Provided fourthly, that the power to appoint and dismiss the Engineer, the Tax Officer and the Accountant of the board shall vest in the board, subject, in the case of dismissal, to a right of appeal to the State Government within one month of the order of dismissal."

By section 84 the provisions of sections 72, 73, 80 and 82 are subject to the provisions of:

"(a) * * * * *

(b) any rule imposing any conditions on the appointment of persons to offices or to any particular office requiring professional skill and on the punishment or dismissal of persons so appointed, and on their liability to service under the orders of any Government on the occurrence of any emergency :

(c) * * * * *

(d) any other rule relating to servants of a board." Section 172 empowers the State Government to make rules under the Act. By clause (2) the State Government may make rules consistent with the Act—

"(a) providing for any matter for which power to make provision is conferred, expressly or by implication, on the State Government by this or any other enactment in force at the commencement of this Act ; and

"(b) generally for the guidance of a board or any Committee of a board or any Government Officer in any matter connected with the carrying out of the provisions of this Act."

The scheme of sections 72, 82, 84 and 172 read with the Rules in so far as it is material in the present case is that an Engineer of the Board shall be appointed by special resolution by the Board. The power to decide all questions arising in respect of the service, leave, pay, allowances and privileges and the power to grant leave of absence, and to punish, or transfer the Engineer is vested in the President. But the power to appoint and to dismiss an Engineer vests in the Board subject to a right of appeal to the State Government against the order of dismissal. The powers of the President and the Board are subject to the Rules imposing conditions on the punishment or dismissal of the Engineer, and other Rules relating to servants of the Board.

The State of U.P. has framed Rules, in exercise of the powers under section 172 (2), two of which are material. In Chapter III (of the Rules dealing with officers and servants of the Boards) there occurs rule 3-A, which provides:

"The period of office of a permanent servant of the board other than a Government servant in its employ shall not determine until—

(i) resignation has been accepted in writing by the authority competent to appoint his successor, or he ceases to be in service by the operation of the rules regulating the retirement of district boards servants, or

(ii) he has given such authority at least three months' notice where his pay exceeds Rs. 15 and in other cases at least one month's notice, or

(iii) he has paid or assigned to the board a sum equal to three month's pay where his pay exceeds Rs. 15 and in other cases a sum equal to one month's pay.

(iv) he has been given by the authority competent to appoint his successor not less than three months' notice or a sum equal to three months' pay in lieu of notice where his pay exceeds Rs. 15, and in other cases, not less than one month's notice or a sum equal to one month's pay in lieu of notice."

The other material rule framed by Notification issued by the Government of U.P. dated 25th March, 1946 is headed "Regulation regarding dismissal, removal or reduction of officers and servants of District Boards". It provides:

"No officer or servant shall be dismissed, removed or reduced without a reasonable opportunity being given to him of showing cause against the action proposed to be taken in regard to him. Any written defence tendered shall be recorded and a written order shall be passed thereon. Every order of dismissal, removal or reduction shall be in writing and shall specify the charge brought, the defence and reasons for the order."

Even though this is designated a regulation it is conceded, and in our judgment rightly, by the Board and the State of U.P. that it is a rule framed in exercise of the powers conferred by section 172 (2) and is not a regulation made in exercise of powers under section 173, for the Act does not confer any power upon the State Government under clause (2) of section 173 to frame regulations regulating the exercise of the power of dismissal of officers or servants of the Board. Under the Rules, therefore, dismissal, removal or reduction of an officer or servant may be effected only after affording him a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. But the services of even a permanent servant of the Board may be determined in the manner provided by rule 3-A.

The Board by its resolution dated 18th October, 1954 purported to exercise the power of determination in the manner and subject to conditions prescribed by rule 3-A. The determination was by resolution of the Board, and *prima facie*, that exercise of the power may be effective. Counsel for the appellant contended that in the absence of a specific power to determine employment conferred by the Act itself, a rule which prescribed restrictions on the exercise of that power was wholly sterile. It was urged that the State Government has prescribed conditions under which the employment of a permanent servant of a Board may be determined, but the Legislature not having conferred upon the Board the power to determine employment otherwise than by way of dismissal as punishment the conditions under which the power could be exercised served no purpose. We are unable to agree with that contention. By section 82 power of the Board to decide questions arising in respect of the service including the power to punish, dismiss, transfer and control servants of the Board is statutorily delegated to the President in case of servants drawing a salary exceeding Rs. 40 per mensem, and to the Secretary for other servants. But the exercise of the power is subject to the conditions prescribed in the provisos. Upon the exercise of the power under section 82 vested in the Board, the President and the Secretary, there is yet another set of restrictions imposed by section 84. The power is subject, among others, to the Rules imposing conditions on the appointment of persons to offices or to particular office requiring professional skill and on the punishment or dismissal of persons so appointed, and to Rules relating to servants of the Board. The rule providing for the procedure for termination of employment of servants of the Board is a rule relating to servants of the Board and may properly be made under section 84 (d) read with section 172 (2). Power to appoint ordinarily carries with it the power to terminate appointment, and a power

to terminate may in the absence of restrictions express or implied be exercised, subject to the conditions prescribed in that behalf, by the authority competent to appoint. The power to terminate employment is therefore to be found in section 82 and the method of its exercise is prescribed by the Rules referred to in section 84. The Rules deal with the conditions under which an officer or servant may be dismissed (the dismissal being by way of punishment) and also under which determination of employment may take place.

It was urged that rule 3-A does not indicate the authority by whom termination is to be effected. But clause (iv) in terms provides that the period of office of a permanent servant of the Board shall not determine until he has been given by the authority competent to appoint his successor notice of the duration specified. It is the notice which terminates the employment and the authority competent to give the notice is the authority competent to appoint the successor of the servant concerned.

We are however unable to agree with the High Court that the expression "dismissal" in the Fourth Proviso to section 82 includes termination of employment *simpliciter*. In the law relating to master and servant the expression "dismissal" has acquired a limited meaning—determination of employment as a method of punishment for misconduct or other cause. That is the meaning in which the expression "[dismissal]" is used in the Rule published by Notification dated 25th March, 1946. By section 84 the power of dismissal of a servant under section 82 can only be exercised subject to the provision of this rule, and the expressions "dismiss" and "dismissal" must have the same connotation in the law which deals with the power and the procedure for exercise of that power. The view expressed by the High Court would lead to the result that even for mere termination of employment the procedure prescribed by the Notification may have to be followed. There is again inherent indication in section 82 which supports the view that the expression has been used in a limited sense. The First Proviso to section 82 confers a right of appeal to servants of the Board, against orders of the President imposing a fine exceeding one month's salary, suspension for a period exceeding one month, reduction by way of punishment, or supersession of a servant in the matter of promotion, as well as against order of dismissal. The orders imposing fine, suspension, reduction or supersession are *ex facie* orders of punishment, and there is no reason why the order of dismissal which occurs in the same clause, and which is subject to appeal is not an order of that nature. The Fourth Proviso also confers a similar right of appeal against the order of the Board dismissing certain superior servants. An appeal against an order of mere determination of employment, which may generally be made in the exigencies of the services may serve no useful purpose. Provision of a right of appeal is indicative of the nature of the order. In our view it is competent under section 84 read with section 172 (2) to the State Government to make Rules imposing conditions on the appointment and punishment of persons to offices or to any particular office requiring professional skill and to provide generally the conditions under which the servants of the Board are to serve, and in the exercise of the powers which are vested by section 82, these Rules have an overriding effect. An order of determination of employment which is not of the nature of an order of dismissal, has by virtue of the Rules framed under clause (d) of section 84 to be exercised consistently with rule 3-A, and an order of dismissal involving punishment must be exercised consistently with the Rule or Regulation framed under the Notification dated 25th March, 1946 under section 84 (b) and (d). We, therefore, hold that the Board had the power to determine the employment of the appellant and the Board purported to exercise that power. But Counsel for the appellant contended that even though in form the power of determination of employment was exercised, in substance, it was intended to exercise the power of dismissal and that the form of the resolution of the Board was merely to camouflage the real object of the Board. It is settled law that the form of the order under which the employment of a servant is determined is not conclusive of the true nature of the order. The form may be merely to camouflage an order of dismissal for misconduct, and it is always open to the Court before which the order is challenged to go behind the form and ascertain

the true character of the order. If the Court holds that the order though in the form merely of determination of employment is in reality a cloak for an order of dismissal as a matter of punishment, the Court would not be debarred merely because of the form of the order in giving effect to the rights conferred by statutory rules upon the employee.

Counsel for the appellant pointed out that in the affidavit filed on behalf of the Board, the entire service-sheet of the appellant since the year 1945 was set out. The affidavit refers to the censure administered to the appellant for neglect of duty on 25th March, 1945, to the order of dismissal of the appellant from service on a finding by the Public Works Committee that he was guilty of negligence and unfaithfulness in 1948, to the comments made by the Chairman of the Board in 1947 that the appellant had not proved himself to be a 'loyal and faithful servant' and to stoppage of increments of the appellant by an order of the President of the Board in 1953 and 1954. Reliance is then placed upon paragraph 21 of the affidavit of the Board in which it was stated that the plea of the appellant that he had honestly and faithfully discharged his duties but the District Board had capriciously and without any justification terminated the services of the appellant was untrue and it was asserted that the services of the appellant had been *justifiably terminated*. It must however be observed that in the petition the appellant challenged the validity of the order terminating his services on the ground firstly that the Board had no power to terminate his employment and secondly that it was not justified in terminating the employment. It was never contended that the order terminating the employment was one in reality of the nature of dismissal as punishment, and the form used in the resolution of the Board was merely to camouflage the real object of the Board. Averment in the petition that the Board had acted capriciously and without any justification does not amount to a plea that the order was intended to be one of dismissal though in form one of determination of employment. It also does not appear to have been argued before the Division Bench that the impugned resolution was in reality one of dismissal. Mootham, C.J., in delivering the judgment of the Court dealt with the only argument advanced before the Court, *viz.*, that although the Board had the power to punish or dismiss the appellant it had no power otherwise to terminate his services in the absence of a special contract which did not exist in this case. If the appellant had in his petition pleaded the case that the order though in the form of determination of employment was intended to be one of dismissal as a matter of punishment and the form was adopted merely to conceal the true object of the Board, it would have given opportunity to the Board to meet that case and to produce all the evidence in that connection in their possession. The question raised is one primarily of fact; and it was never raised, nor explored in the High Court on proper pleadings. It would be taking the Board by surprise to allow the appellant to make out this new case at this stage. We therefore refuse to consider the question whether the order passed against the appellant pursuant to the resolution dated 18th October, 1954 was for dismissal of the appellant from the service of the Board, as a punishment for misconduct.

The appeal therefore fails and is dismissed. Having regard to the circumstances, there will be no order as to costs in this Court.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.
 Munna Lal (In all the Appeals) .. Appellant*

v.

The State of Uttar Pradesh (In all the Appeals) .. Respondent

Prevention of Corruption Act (II of 1947), section 5 (2)—Prosecution and trial under—Investigation irregular and not in accordance with section 5-A—Whether vitiates the trial—Whether there was proper sanction in view of the fact that the four cases originally filed were subsequently split up into seven.

On the facts of the case, though the letter of section 5-A of the Prevention of Corruption Act (II of 1947) was complied with, its spirit was not, for in reality there was no investigation by the Officer authorized under that section and the real investigation was by a Sub-Inspector of Police who was never authorised.

The trial was not vitiated as the appellant was not prejudiced on account of the illegal or irregular investigation, further on the alternative case put forward by the appellant, the substance of the prosecution case was practically admitted by him and he merely pleaded certain mitigating circumstances.

It is true that the Special Judge split up the four cases into seven; but it is not disputed that the amounts involved in the three new cases which the Special Judge had directed for splitting up due to the difficulty of joint trial were with respect to amounts which were included in the four cases filed before him and with respect to which there was sanction. The mere fact that in view of the provisions of section 239 of the Criminal Procedure Code the Special Judge thought it necessary to separate the trial with respect to certain items for which there was sanction would not mean that these cases which were directed by the Special Judge to be split up for that reason had no sanction behind it.

The State of Madhya Pradesh v. Mubarak Ali, (1959) S.C.J. 843 : (1959) 2 M.L.J. (S.C.) 105 : (1959) 2 An.W.R. (S.C.) 105 : (1959) M.L.J. (Cri.) 571, distinguished.

Appeals by Special Leave from the Judgment and Order, dated 21st December, 1960, of the Allahabad High Court in Criminal Appeals Nos. 737, 738 and 744 of 1960.

Frank Anthony and P. C. Agarwala, Advocates, for Appellant.

G. C. Mathur and G. P. Lal, Advocates, for Respondent.

The Judgment of the Court was delivered by

Wanchoo, J.—These are three appeals by Special Leave against the judgment of the Allahabad High Court. It will be convenient to dispose them of together, though they arise out of three different trials before the Special Judge, Saharanpur under section 5 (2) of the Prevention of Corruption Act, (II of 1947), hereinafter referred to as the Act), as the appellant is the same in all the appeals.

The brief facts necessary for present purposes are these. Munnalal was the cashier of the Municipal Board of Hardwar and had been working as such since 1932. He was in-charge of the cash and it was his duty to see that whenever the funds in his possession exceeded Rs. 4,000 they were deposited in the Treasury or the Imperial Bank of Roorkee. In 1949 there was an audit of the accounts of the Board and on 24th May, 1949, the auditor found that the money received by the Board from 20th April, 1949 to 23rd May, 1949 totalling Rs. 52,144 had not been deposited in the Treasury or the Imperial Bank at Roorkee. The matter was then reported to the Chairman of the Board, who called Munnalal and took his explanation as to the alleged embezzlement. It is said that the appellant admitted that he had spent some of the money in the marriage of his daughter and some was used in his shop and Rs. 10,000 to Rs. 11,000 had been given to the Executive Officer and the remainder was at his house. The appellant was asked to make good the loss immediately but failed to do so. Thereupon the appellant was suspended and the matter was handed over to the police for investigation.

The police registered a case under section 409 of the Indian Penal Code and after investigation prosecuted the Executive Officer as well as the appellant and his

brother who was the Assistant Cashier at the relevant time. The case was transferred by the High Court to a Magistrate in Meerut; but that case was not proceeded with as an application was made to withdraw it on the ground that the case was covered by section 5 (2) of the Act. So the Magistrate discharged the three accused of that case. Thereafter necessary sanction was given for prosecution under section 5 (2) of the Act and four prosecutions were launched against the appellant and his brother. The Special Judge, however took the view that the joint trial of the appellant and his brother was not possible with respect to some of the moneys said to have been embezzled. He therefore ordered that there should be three separate trials of the appellant alone with respect to certain moneys in addition to the four trials of the appellant and his brother with respect to the remainder. That is how seven trials took place. In the present appeals we are not concerned with the other accused, namely, the brother of the appellant, as he was acquitted. We are also not concerned with four of the trials; we are only concerned with three trials with respect to three sums of money in these three appeals. Appeal No. 102 is concerned with a sum of Rs. 1,623-4-0 received between 14th April, 1949, and 23rd May, 1949 and not accounted for. Appeal No. 103 is concerned with a sum of Rs. 9,611-9-6 received between 20th April, 1949, and 24th May, 1949, and not accounted for; and Appeal No. 104 is concerned with a sum of Rs. 43,087-0-3 received between 20th April, 1949 and 24th May, 1949 and not accounted for.

The case of the prosecution was that these sums were received by the appellant during the period mentioned above and had not been deposited either in the Treasury or in the Imperial Bank at Roorkee as required by the rules. The appellant practically admitted the receipt of the money except a few items which were also found by the Special Judge to have been received by him. He also admitted that his duty was to deposit any sums above Rs. 4,000 in the Imperial Bank or the Treasury at Roorkee. He was however inconsistent in his defence as to what he did with the moneys which he had undoubtedly received. He first tried to prove that he had deposited the amounts. In the alternative his case was that a practice had been prevailing for many years in the office of the Board under which the Executive Officer and other employees of the Board used to take advances from the Cashier from time to time by sending slips and the Cashier was utilised as a banker for all officers and servants of the Board, including the Executive Officer. Though these sums were supposed to be returned to the Cashier (appellant) in the beginning of the next month when pay was drawn by those who had taken these unauthorised advances, in actual fact this did not always happen. The result of these advances which were sometimes of large amounts was that the money could not be deposited in the Treasury according to the rules as these advances were being consistently made to the officers and servants of the Board. The appellant therefore contended that he had not converted the money to his own use and had advanced the same to the officers and servants of the Board according to the practice prevalent for a number of years and such advances were even made to the highest officer of the Board, namely, the Executive Officer, and that the officers all knew of this practice and also knew that moneys were not being deposited in the Bank or the Treasury at Roorkee as required by rules.

The Special Judge held on the evidence that it was proved that the moneys which were the subject-matter of the charge (except for two items) had been received by the appellant. He also held that except for certain items, the appellant had dishonestly or fraudulently misappropriated or otherwise converted to his own use the property entrusted to him or under his control as a public servant or allowed any other person so to do. He therefore found the appellant guilty under section 5 (2) of the Act read with section 5 (1) (c) thereof. The Special Judge sentenced the appellant to five year's rigorous imprisonment in the cases from which Appeals Nos. 102 and 103 arise but ordered the sentences to run concurrently. He also sentenced the appellant in the case from which Appeal No. 104 arises to five

year's rigorous imprisonment and a fine of Rs. 42,000. The sentence in this case was apparently not made concurrent.

The appellant filed three appeals before the High Court which were heard together. The High Court agreed with the conclusion of the Special Judge and upheld the conviction of the appellant in the three cases. In view however of the practice to which reference has been made above and which was proved to the hilt and in view also of the fact that these cases had taken almost 11 years to be disposed of, the High Court reduced the sentences in the three cases to two years' rigorous imprisonment and made them all concurrent. It also set aside the sentence of fine as it was of the view that though the appellant was guilty he had not converted the money to his own use but had advanced most of it to the officers and servants of the Board. The present appeals by Special Leave are against these judgments of the High Court in the three appeals.

Two points have been urged on behalf of the appellant and it is said that in view of those points the trial was illegal and should be quashed. In the first place it is urged that the investigation was irregular and not in accordance with section 5-A of the Act. Section 5-A lays down that no Police Officer below the rank of a Deputy Superintendent of Police shall investigate any offence punishable under the Act outside the Presidency Towns without the order of a Magistrate of the First Class. What happened in this case was that originally the entire investigation was done by a Sub-Inspector of Police and thereafter the case under sections 409/406 of the Indian Penal Code was instituted against the appellant, his brother and the Executive Officer. That case was later withdrawn and it was thereafter that sanction was granted for the prosecution of the appellant and his brother under section 5 (2) of the Act and investigation was made as required by section 5-E. But the evidence shows that this investigation merely consisted of this that the duly authorised investigating officers went through the papers of the earlier investigation and decided to file four prosecutions as already indicated on the basis of the earlier investigation. It does appear from these facts that though the letter of section 5-A of the Act was complied with its spirit was not, for in reality there was no investigation by the officer authorised under that section and the real investigation was by a Sub-Inspector of Police who was never authorised. In *H. N. Rishbud and Inder Singh v. The State of Delhi*¹, this Court held that "section 5-A is mandatory and not directory and an investigation conducted in violation thereof is illegal". This Court further held that

"if cognizance is in fact taken on a police report in breach of a mandatory provision relating to investigation, the results which follow cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice."

It was further held that

"an illegality committed in the course of an investigation does not affect the competence and the jurisdiction of the Court for trial and where cognizance of the case has in fact been taken and the case has proceeded to termination the invalidity of the proceeding investigation does not vitiate the result unless miscarriage of justice has been caused thereby."

In view of this decision, even if there was irregularity in the investigation and section 5-A was not complied with in substance, the trials cannot be held to be illegal unless it is shown that miscarriage of justice has been caused on account of the illegal investigation. Learned Counsel for the appellant has been unable to show us how there was any miscarriage of justice in these cases at all due to the irregular investigation. As a matter of fact on the alternative case put forward by the appellant, the substance of the prosecution case was practically admitted by him and he merely pleaded certain mitigating circumstances. Learned Counsel for the appellant however drew our attention to *The State of Madhya Pradesh v. Mubarak Ali*². In that case an objection was taken before the trial began before the Special Judge that the investigation had been carried on in breach of section 5-A of the Act. The

¹ 1. (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) 105 : (1959) 2 An.W.R. (S.C.) 105 : 1959 M.L.J. 173 : (1955) 1 S.C.R. 1150. (Cr.) 571 : A.I.R. 1959 S.C. 707.
2. (1959) S.C.J. 843 : (1959) 2 M.L.J. (S.C.)

matter went before the High Court and it directed that in order to rectify the defect and cure the illegality in the investigation, the Special Judge should have ordered the Deputy Superintendent of Police to carry on the investigation himself while the case remained pending in the Court of the Special Judge. That order of the High Court was brought in appeal to this Court, and the appeal was dismissed. This case in our opinion is of no assistance to the appellant, for there the objection was taken at the earliest stage before the trial began and it was in those circumstances that the trial was stayed till proper investigation was completed and a proper report made thereafter for the prosecution of the accused of that case. In the present cases no objection was taken at the trial when it began and it was allowed to come to an end. In these circumstances the ratio of *Mubarak Ali's case*¹, cannot apply and the decision in *Rishbud's case*² would apply. The appellant therefore cannot say that the trial was vitiated unless he can show that any prejudice was caused to him on account of the illegal or irregular investigation. We have already remarked that no such thing has been shown in this case; nor was it possible to show any such thing in view of the alternative defence taken by the appellant. We therefore reject this contention.

The next contention that has been urged is that there was no proper sanction in these cases and this is based on the fact that only four cases were filed before the Special Judge with of course proper sanction; but these cases were split up into seven and the argument is that there was no sanction for the remaining three cases, and two of the present appeals namely Nos. 102 and 103 are out of these split up cases. It is also urged that the sanction was not with respect to section 5 (1) (c) of the Act though it was under section 5 (2) of the Act and therefore it was insufficient to confer jurisdiction on the Special Judge to try the appellant under section 5 (1) (c) read with section 5 (2). We are of opinion that there is no force in either of these contentions. It is true that the Special Judge split up the four cases before him into seven; but it is not disputed that the amounts involved in the three cases which the Special Judge had directed for splitting up due to the difficulty of joint trial were with respect to amounts which were included in the four cases filed before him and with respect to which there was sanction. The mere fact that in view of the provisions of section 239 of the Code of Criminal Procedure the Special Judge thought it necessary to separate the trial of Munna Lal with respect to certain items for which there was sanction would not mean that these cases which were directed by the Special Judge to be split up for that reason had no sanction behind it. The sanction of the original four cases would cover these three cases also which were split out of the original four cases.

As to the argument that there was no sanction for prosecution under section 5 (1) (c), it is clear that there is no force in it. The sanction says that the appellant had received money and misappropriated it by not crediting the same into the Treasury and embezzled it and was therefore guilty of criminal misconduct and liable to prosecution under sections 409/406 and section 5 (2) of the Act. The allegations made clearly show that the sanctioning authority had section 5 (1) (c) in mind because the sanction speaks of misappropriation and embezzlement of the money of the Board and misappropriation and embezzlement is only to be found in section 5 (1) (c). It is argued however that section 5 (1) (c) speaks of misappropriation or otherwise conversion to his own use any property entrusted to him or under his control by a public servant himself. It also speaks of a public servant allowing another person to do so. But the sanction seems to show as if the appellant was to be prosecuted for converting the property to his own use. There is in our opinion no substance in this argument, for the sanction speaks of misappropriation and embezzlement and there is nothing in the words to imply that this was only with reference to conversion by the appellant to his own use. As the words of the sanction stand they would cover a case of misappropriation or conversion to his own use by the appel-

¹ 11 (1959) S.C.J. 843 : (1959) 2 M.L.J. 2. (1955) S.C.J. 283 : (1955) 1 M.L.J. (S.C.) (S.C.) 105 : (1959) 2 An.W.R. (S.G.) 105 : 173 : (1955) 1 S.C.R. 1150. 1959 M.L.J. (Cri.) 571 : A.I.R. 1959 S.C. 707.

lant himself or by allowing others to do so. We are therefore of opinion that the sanction was sufficient for the purpose of giving jurisdiction to the Special Judge to take cognizance of the cases out of which these appeals have arisen.

This brings us to the merits of the three appeals. So far as this is concerned, learned Counsel for the appellant has not urged—and, in our opinion, rightly—that the convictions are unjustified. The only question that he has urged is that in view of the established facts that the appellant was using the Board's money in order to advance it to the officers and servants of the Board, beginning with the highest officer of the Board, namely, the Executive Officer and that the evidence as found by the High Court does not seem to establish that there was any conversion of the moneys by the appellant to this own use, this is a case in which the appellant was more sinned against than sinning. It is conceded that as the appellant was the Cashier it was his duty in law to follow the rules with respect to the custody of the cash of the Board entrusted to him and if he did not do so he would be guilty. But it is urged that when the highest officer of the Board, namely, the Executive Officer was himself taking out money from the funds of the Board by sending slips to the Cashier and other officers and servants of the Board were doing the same thing and this was well known, presumably also to the Chairman of the Board, it is not just that the appellant should be made to suffer when he was obliging the officers and servants of the Board and might even have felt compelled to grant the demands of the Executive Officer and other officers and servants of the Board, for he was serving under some of them. We must say that the evidence discloses a scandalous state of affairs which was allowed to go on and even the highest officer of the Board, namely, the Executive Officer, was cognizant of this state of affairs and was himself a party to it. The appellant's case further was that even the Chairman knew about it and was at times party to it and this may also be not incorrect. In these circumstances there is force in the contention on behalf of the appellant that he was more sinned against than sinning and that the misappropriation took place because he had to oblige these officers and servants of the Board or otherwise incur their displeasure which he could hardly do. So it is urged on behalf of the appellant that as he has already been in jail for more than ten months in the circumstances that punishment along with the fact that the trial had been prolonged for eleven years since 1949 should be sufficient punishment for him. Ordinarily this Court does not interfere in the matter of sentence in appeals under Article 136; but we think in the circumstances disclosed in the present appeals when the officers and servants of the Board including the highest officer were behaving as if the moneys of the Board were their private property and the misappropriation took place mainly because the appellant was obliging these officers and servants of the Board, that the sentence already undergone by the appellant would meet the ends of justice. We ought to add that Mr. Mathur who appeared for the respondent-State did not feel justified—and we think rightly—in pressing for the confirmation of the reduced sentence passed by the High Court in appeal. We therefore dismiss the appeals with the modification that the sentence in each case is reduced to the period already undergone. The appellant, if on bail, shall be discharged from his bail bonds in respect of these appeals.

K.L.B.

Appeals dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.
Chittaranjan Das .. *Appellant**

v.

The State of West Bengal .. *Respondent.*

Criminal Procedure Code (V of 1898); section 222 (1)—Particulars required for a valid charge—Sections 535 and 537—Applicability—Section 421 (1)—Scope.

The basic requirement in every criminal trial is that the charge must be so framed as to give the accused person a fairly reasonable idea as to the case which he is to face and the validity of the charge—

* Criminal Appeal No. 175 of 1960.

22nd April, 1963.

must in each case be determined by the application of the test (*viz.*) had the accused a reasonably sufficient notice of the matter with which he was charged. It would not be right to hold that a charge is invalid solely for the reason that it does not specify the particular date and time at which any offence is alleged to have been committed. Where the provisions prescribed by the law of procedure are intended to be mandatory, the Legislature indicates its intention in that behalf clearly and contravention of such mandatory provisions may introduce a serious infirmity in the proceedings themselves but where the provisions made by the law of procedure are not of vital importance, but are, nevertheless, intended to be observed, their breach may not necessarily vitiate the trial unless it is shown that the contravention in question has caused prejudice to the accused. The position is made clear by sections 535 and 537 of the Criminal Procedure Code (V of 1898).

The precision of the charge in respect of the date on which the offence is alleged to have been committed will depend upon the nature of the information available to the prosecution in a given case. Where it is possible to specify precisely the necessary particulars required by section 222 (1) of the Code, the prosecution ought to mention the said particulars in the charge, but where the said particulars cannot be precisely specified in the charge having regard to the nature of the information available to the prosecution, failure to mention such particulars may not invalidate the charge. Having regard to all the relevant facts, if it appears to the Court that the charge could and ought to have been framed more precisely the Court may reach that conclusion and then enquire whether the defective charge has led to the prejudice of the accused.

Section 421 of the Code is clear and unambiguous. Summary dismissal only means that having considered the merits of the appeal, the High Court does not think it advisable to admit the appeal because in its opinion the decision appealed against is right. If the High Court in dealing with Criminal appeals takes the view that there is no substance in the appeal, it is not necessary that it should record reasons for its conclusion in summarily dismissing it.

Appeal from the Judgment and Orders dated 22nd July, 1960, of the Calcutta High Court in Criminal Appeal No. 448 of 1960.

A. S. R. Chari and *N. S. Bindra*, Senior Advocates (*D. N. Mukherjee*, Advocate, with them), for Appellant.

B. Sen, Senior Advocate (*S. C. Mazumdar*, Advocate for *P. K. Bose*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The appellant Chittaranjan Das was charged with having committed an offence punishable under section 376, Indian Penal Code. This charge was framed against him on three counts. It was alleged that between 18th November, 1958 and 21st November, 1958 at 29-A and B, Kailash Bose Street, Calcutta, he committed rape on Sandhyarani Das Gupta alias Nirmala. The second count was that he committed the same offence at the same place and in respect of the same girl between 1st December, 1958 and 6th December, 1958; and the third count related to the commission of the said offence between 9th December, 1958 and 15th December, 1958 at the same place and in respect of the same girl. Along with the appellant, Ganesh De was charged with having abetted the appellant in the commission of the said offence, the charge framed against Ganesh De being under section 376 read with section 109 of the Indian Penal Code. The learned Presidency Magistrate, 8th Court, Calcutta, held the commitment proceedings, and was satisfied that the evidence adduced by the prosecution before him made out a *prima facie* case against both the accused persons. Since the offence in question was triable exclusively by the Court of Sessions, the learned Magistrate committed them to the Sessions on the 4th May, 1960.

The case of the appellant and his co-accused was then tried by the City Sessions Court at Calcutta with the aid of jury. The jury returned a verdict of guilty against the appellant in respect of all the three counts. A similar verdict was brought by the jury in respect of the co-accused Ganesh De. The learned Sessions Judge took the view that the verdict of the jury was not perverse, and so, he decided to accept the said verdict and accordingly convicted the appellant under section 376 and sentenced him to suffer rigorous imprisonment for four years on the first charge. No separate sentence was awarded in respect of the other charges. Ganesh De was also sentenced to a similar period of imprisonment. This order was passed on the 9th July, 1960.

The appellant challenged the correctness of the order of conviction and sentence passed against him by the learned Sessions Judge by preferring an appeal before the

Calcutta High Court. A Division Bench of the said High Court did not feel impressed by the points made on appellant's behalf, and so, his appeal was summarily dismissed on the 22nd July, 1960. The appellant then applied for a certificate under Article 134 (1) (c) of the Constitution. This application was allowed by Lahiri, C.J. and Bose, J., on the ground that some of the points which the appellant wanted to raise before this Court by his appeal were substantial points of law, and so, they granted him a certificate under the said Article. It is with this certificate that the appellant has come to this Court.

Before dealing with the points which fall to be considered in the present appeal, it is necessary to state briefly the material facts leading to the prosecution of the appellant. Sandhyarani Das Gupta was a minor girl who was staying with her mother Soudamini in the Refugee Colony at Ghola. It appears that one Maniprova alias Manibala Majumdar induced this young girl to go to her house at Ashutosh Mukherjee Road, Bhowanipur some time in the first week of November, 1958. Manibala induced Sandhya to go to her place with a promise that she would secure a nurse's job for her. The appellant was the Zonal Officer of the Refugee Rehabilitation Office at Tollygunge at that time and, according to the prosecution, the co-accused Ganesh De was a peon in the said office. The prosecution alleged that in course of time, Sandhya was taken to the appellant in his house in about the middle of November, 1958, on the representation that the appellant wanted to give her employment. When Sandhya met the appellant, the appellant held out the hope of a job for her and he managed to ravish her. Similarly, Sandhya was taken to the house of the appellant on two or three occasions within a period of one month and each time the appellant had sexual intercourse with her. Every time this happened the appellant promised that he would provide Sandhya with a job. The prosecution case is that as a result of this sexual intercourse, Sandhya conceived, and the appellant was anxious to cause her abortion. In accordance with the plan, Manibala attempted to cause her abortion but did not succeed, and so, the girl was taken to the Chittaranjan Sevasadan on the 11th February, 1959, where the abortion was completed. Some time thereafter, she was sent back to her own house on her insistence. It appears from the evidence that Sandhya was again taken to the house of the appellant and was ravished by him. This happened on two or three occasions again. At one of these meetings with the appellant, Sandhya was introduced to a young man named Himangsu Ganguli. This young man had approached the appellant for a job. The appellant exploited the helpless position of both Himangsu and Sandhya, and asked them to go through a show of marriage. Thereafter, the appellant wanted a photograph in proof of their marriage and a group photo was accordingly taken with Ganesh De, Manibala, Himangsu and Sandhya, the last two having posed as husband and wife. Himangsu and Sandhya then went to the house of the appellant and gave him a copy of the photograph. This time again Sandhya was ravished by the appellant. That, in broad outlines, is the prosecution case against the appellant.

On the 6th June, 1959, Sandhya's mother filed a complaint that her daughter had disappeared. This complaint was investigated by the Enforcement Branch, Calcutta, and in consequence, Sandhya was recovered from the house of Ganesh De on the 10th June, 1959. She was then taken to the Tollygunge Police Station where her statement was recorded. It, however, appeared that the offence which on Sandhya's statement seemed to have been committed by the appellant was within the jurisdiction of the Amberst Street Police Station, and so, the case papers were transferred to the said Police Station. Sandhya's statement was again recorded at this Police Station on the 12th June, 1959. As a result of the statement, challan was forwarded which specified 14th November, 1958, 30th May, 1959 and 6th June, 1959, as the dates on which the appellant had raped Sandhya. Subsequently, the appellant was arrested and he along with the co-accused was charged before the Court of the Presidency Magistrate as we have already mentioned.

In granting certificate to the appellant, the High Court has held that the point which the appellant sought to raise in regard to the invalidity and illegality of the

charge was a point of substance. In fact, it has observed that the scheme of section 222 of the Criminal Procedure Code seems to suggest that the charge framed in the present case contravened the requirement of section 222 (1), and was therefore, invalid. The High Court also appears to have thought that this contention received support from a decision of the Calcutta High Court in *Ali Hyder v. Emperor*¹. It is, therefore, necessary to examine this argument at the outset. We have already set out the 3 counts of the charge framed against the appellant and we have noticed that in the three counts periods were mentioned within which the appellant was alleged to have committed rape on Sandhya. The first period was between 18th November, 1958 to 21st November, 1958, second was 1st December, 1958 to 6th December, 1958, and the third was 9th December, 1958 to 15th December 1958. The argument is that section 222 (1), Criminal Procedure Code, requires that the charge must specify, *inter alia*, the particulars as to the time when the offence was committed, and this means that the precise date on which and the time at which the offence was committed must be stated in the charge. Before dealing with this argument, it is necessary to read section 222 :

"(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234 :

Provided that the time included between the first and last of such dates shall not exceed one year."

The appellant's contention is that it is only in cases under section 222 (2) where the prosecution is not required to specify the precise date and time at which the offence is committed ; and that means that it is only in respect of the offences of criminal breach of trust or dishonest misappropriation of money to which the said sub-section applies that liberty may be claimed by the prosecution not to mention the date and time of the offence. In all other cases to which section 222 (1) applies, particulars as to the time and place of the alleged offence must be specifically mentioned. In our opinion, this contention is not well founded. In fact, Mr. Chari who appeared for the appellant himself conceded that in almost every charge to which section 222 (1) applies, it is usual to state that the particular offence was committed on or about a certain date. In other words, it is not suggested by Mr. Chari that the specific date and the specific time must necessarily be stated in the charge in every case. If it is permissible to say in a charge that a particular offence was committed on or about a specified date, without specifying the particular time, it is difficult to hold that because a period of four or five or six days is indicated in the charge within which the offence is alleged to have been committed section 222(1) has been contravened. It is true that sub-section (2) specifically deals with two kinds of offences and makes a provision in respect of them, but that is not to say that in every other case, the time must be so specifically mentioned as to indicate precisely the date and the time at which the offence was committed.

It is quite clear that if the charge mentions an unduly long period during which an offence is alleged to have been committed, it would be open to the criticism that it is too vague and general, because there can be no dispute that the requirement of section 222 (1) is that the accused person must have a reasonably sufficient notice as to the case against him. The basic requirement in every criminal trial therefore, is that the charge must be so framed as to give the accused person a fairly reasonable idea as to the case which he is to face, and the validity of the charge must in each case be determined by the application of the test, *viz.*, had the accused a reasonably sufficient notice of the matter with which he was charged ? It is quite conceivable that in some cases by making the charge too vague in the matter of the time of the commission of the offence an accused person may substantially be deprived of an

opportunity to make a defence of *alibi*; and so, the criminal Courts naturally take the precaution of framing charges with sufficient precision and particularity in order to ensure a fair trial; but we do not think it would be right to hold that a charge is invalid solely for the reason that it does not specify the particular date and time at which any offence is alleged to have been committed. In this connection, it may be relevant to bear in mind that the requirements of procedure are generally intended to subserve the ends of justice, and so, undue emphasis on mere technicalities in respect of matters which are not of vital or important significance in a criminal trial, may sometimes frustrate the ends of justice. Where the provisions prescribed by the law of procedure are intended to be mandatory, the Legislature indicates its intention in that behalf clearly and contravention of such mandatory provisions may introduce a serious infirmity in the proceedings themselves; but where the provisions made by the law of procedure are not of vital importance, but are, nevertheless, intended to be observed, their breach may not necessarily vitiate the trial unless it is shown that the contravention in question has caused prejudice to the accused. This position is made clear by sections 535 and 537, Criminal Procedure Code.

Take, for instance, the case of murder where the prosecution seeks to prove its case against an accused person mainly on circumstantial evidence. In such a case, investigation would generally begin with, and certainly gather momentum after, the discovery of the dead body. In cases of circumstantial evidence of this character, it would be idle to expect the prosecution to frame a charge specifying the date on which the offence of murder was committed. All that the prosecution can do in such cases is to indicate broadly the period during which the murder must have been committed. That means the precision of the charge in respect of the date on which the offence is alleged to have been committed will depend upon the nature of the information available to the prosecution in a given case. Where it is possible to specify precisely the necessary particulars required by section 222 (1), the prosecution ought to mention the said particulars in the charge, but where the said particulars cannot be precisely specified in the charge having regard to the nature of the information available to the prosecution, failure to mention such particulars may not invalidate the charge.

In this connection, it may be useful to refer to the facts in the present case. The evidence of Sandhya shows that she and the members of her family had to face the terrible problems posed before the refugees in that part of the country, and in her anxiety to help her destitute family in its hour of need. Sandhya was very easily persuaded by Manibala to adopt the course of earning money by selling her body. In such a case, if the minor girl has been exposed to the risk of having sexual intercourse with several people from time to time, it is unreasonable to expect that she would be able to specify the precise dates on which particular individuals had intercourse with her. If it is insisted that in a case of this kind, the charge of rape framed against the appellant must specify the date on which the offence was committed by him, it would really mean that the appellant cannot be charged with the offence because the unfortunate victim would, in the ordinary course of things, not be able to state precisely the dates on which she was made to submit to the appellant. Therefore, in dealing with the question as to whether the charge framed in a criminal trial has contravened section 222 (1), the Court will have to examine all the relevant facts and if it appears to the Court that having regard to them, the charge could and ought to have been framed more precisely, the Court may reach that conclusion and then enquire whether the defective charge has led to the prejudice of the accused. That, in our opinion, is the reasonable course to adopt in dealing with contentions like the one raised by the appellant before us. The question of prejudice did not impress the High Court, because it has summarily dismissed the appeal. It is not a matter on which the appellant can be permitted successfully to challenge the view taken by the High Court. In this connection, we ought to add that the decision in the case of *Ali Hyder*¹, to which the High Court has referred in granting a certificate on this point does not support the contention in question.

The next ground on which the High Court has granted certificate to the appellant is that the Division Bench should not have summarily dismissed his appeal, and in coming to the conclusion that this argument amounted to a substantial point of law, the High Court has referred to two decisions of this Court in *Mushtak Hussein v. The State of Bombay*¹, and *Shreekantiah Ramayya Municipalli and another v. The State of Bombay*². In *Mushtak Hussein's case*¹, this Court has no doubt observed that it is not right for the High Court to dismiss an appeal preferred by the accused to that Court summarily where it raises some arguable points which require consideration. It was also added that in cases which *prima facie* raise no arguable issue, that course is, of course, justified. It is in the light of this conclusion that this Court stated that it would appreciate it if in arguable cases the summary rejection orders give some indications of the views of the High Court on the points raised.

In the case of *Shreekantiah Ramayya*², it appeared that out of the two appeals filed separately by two different accused persons against the same judgment, one was summarily dismissed by one Bench of the High Court and the other was admitted by another Bench. It is in the light of this somewhat anomalous position that this Court repeated its observations made in the *Case of Mushtak Hussein*¹ that summary rejections of appeals which raise issues of substance and importance are to be disapproved.

With respect, there can be no doubt whatever that in dealing with criminal appeals brought before them the High Courts should not summarily reject them if they raise arguable and substantial points and it would be stating the obvious if we were to add that no High Court summarily dismisses a criminal appeal if it is satisfied that it raises an arguable or substantial question either of fact or of law. In this connection, it is, however, necessary to bear in mind that it is for the High Court which deals with the criminal appeal preferred before it to consider whether it raises any arguable or substantial question of fact or law, or not. Section 421 (1) of the Code provides that on receiving the petition and copy under section 419 or section 420, the appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. The Proviso to this section requires that no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same. Sub-section (2) empowers the appellate Court to call for the record of the case before dismissing the appeal under sub-section (1) but it does not make it obligatory on the Court to do so. Therefore, the position under section 421 is clear and unambiguous. When a criminal appeal is brought before the High Court, the High Court has to be satisfied that it raises an arguable or substantial question; if it is so satisfied, the appeal should be admitted; if, on the other hand, the High Court is satisfied that there is no substance in the appeal and that the view taken by the trial Court is substantially correct, it can summarily dismiss the appeal. It is necessary to emphasise that the summary dismissal of the appeal does not mean that before summarily dismissing the appeal, the High Court has not applied its mind to all the points raised by the appellant. Summary dismissal only means that having considered the merits of the appeal, the High Court does not think it advisable to admit the appeal because in its opinion, the decision appealed against is right. Therefore, we do not think the High Court was right in granting certificate to the appellant on the ground that his appeal should not have been summarily dismissed by another Division Bench of the said High Court. If the High Court in dealing with criminal appeals takes the view that there is no substance in the appeal, it is not necessary that it should record reasons for its conclusion in summarily dismissing it.

The third ground on which the certificate has been granted by the High Court is in regard to an alleged misdirection in the charge delivered by the learned Sessions Judge to the Jury. It appears that in dealing with the argument of the defence

1. A.I.R. 1953 S.C. 282 : (1953) S.C.J. 338.

2. A.I.R. 1955 S.C. 287 : (1955) S.C.J. 233.

that the charge was vague and that the dates specified in the charge did not correspond to the dates given by Sandhya in her evidence, the learned Judge told the jury that if the statement of the girl in her cross-examination is taken as the basis, the dates on which the girl was ravished by the appellant would not be covered by the three sets of dates mentioned in the charge, and then he added that "in case you hold that the charges are in order, in that case you shall proceed to consider the evidence." It was urged by the appellant before the Division Bench of the High Court which granted the certificate that the last statement constituted a misdirection. The argument was that whether or not a charge is valid is a question of law which the learned Judge should have decided himself and given a direction to the jury in accordance with his decision; inasmuch as he left that question to the jury, he failed to exercise his jurisdiction and to discharge his duty, and as such the charge must be held to suffer from a serious misdirection. This argument appears to have appealed to the Division Bench which granted the certificate and has been pressed before us by Mr. Chari. In our opinion, there is no substance in this argument. We should have stated earlier that after the committal order was passed by the Presidency Magistrate, the appellant moved the High Court in its revisional jurisdiction and urged that the charge framed against him was defective and invalid and should be quashed. The High Court rejected this contention and held that the charge was valid within the meaning of section 222 and section 234 of the Code. Therefore, the true position is that at the time when the learned Sessions Judge delivered his charge to the jury, the question about the validity of the charge had been considered by the High Court and so far as the learned Sessions Judge was concerned, the finding of the High Court was binding on him; so that where the learned Sessions Judge told the jury that they may consider whether the charges were in order, he was really leaving it open to the jury to consider the matter which had been decided against the appellant and in favour of the prosecution. If there can be any grievance against this part of the charge, it would be on the side of the prosecution and not on the side of the appellant.

That leaves to be considered certain other alleged misdirections to which Mr. Chari has referred. Mr. Chari contends that in explaining the true legal position with regard to the evidence of a prosecutrix in cases of rape, the learned Judge did not tell the jury that in view of the contradictions brought out in the evidence of Sandhya and in view of her past career and record, her evidence should not be believed. Mr. Chari argues that when criminal Courts require corroboration to the evidence of the prosecutrix in such cases, as a matter of prudence, it necessarily means that in the first instance, the prosecutrix must appear to the Court to be a reliable witness. If the prosecutrix does not appear to be a reliable witness, or if her evidence suffers from serious infirmities, corroborations in some particulars would not help the prosecution, and according to Mr. Chari, this aspect of the matter was not properly brought to the notice of the jury by the learned Sessions Judge. We do not think there is any substance in this contention. We have carefully read the charge and we are satisfied that on the whole, the charge has not only been fair, but has been more in favour of the appellant than in favour of the prosecution. In fact, the whole tone of the charge indicates that the learned Sessions Judge was not satisfied that the prosecution had really made out a case against the appellant beyond a reasonable doubt. But in delivering charge to the jury, the learned Sessions Judge can never usurp the function of the jury. He cannot pronounce on the reliability or otherwise of any witness. The requirement as to corroboration in regard to the evidence of a prosecutrix like Sandhya has been elaborately explained by the Sessions Judge to the jury. He told them that the most important witness in the case was Sandhya and that there was hardly any corroborative evidence to her story. He also warned them that though it was not illegal to act upon the evidence of a prosecutrix, it was unsafe to adopt that course and he said that before convicting the appellant on the uncorroborated testimony of Sandhya, the members of the jury should ask themselves whether they were so much convinced about the truthfulness of the girl as to accept her evidence in its entirety. He referred to the broad and material contradictions brought out in her evidence and asked them to bear that fact

in mind in deciding whether they should accept her testimony or not. Having regard to the several statements made by the learned Judge in his charge on this topic we find it difficult to accept Mr. Chari's grievance that the charge was materially defective in this matter.

The next misdirection on which Mr. Chari has relied is in regard to the prosecution evidence about the age of the girl. The prosecution alleged that the girl was below 16 years of age, whereas the defence contended that she was above 16 and was a consenting party. As usual, evidence was given by the prosecution in support of its case as to the girl's age. This evidence consisted of the testimony of the girl's mother Saudamini and of Dr. Nag as well as Dr. Saha. Having summarised the material evidence fairly and accurately, the learned Judge told the jury that the said evidence was no doubt somewhat conflicting and he warned them that they had to decide as a question of fact whether the age of the girl at the relevant time was above or below 16. Mr. Chari contends that at this stage, the learned Judge should have told the jury that the onus to prove the fact that the girl was below 16 was on the prosecution and that if there was any doubt about her age, the benefit of the doubt must go to the appellant. We do not think there is any substance in this argument. In the first part of his charge, the learned Judge explained to the jury the essential requirements which had to be proved by the prosecution in support of its charge under section 376 and there the learned Judge had made it clear to the jury that the prosecution had to show that the girl was below 16. That being so, we do not think that his failure to mention the point about onus once again when he dealt with the actual relevant evidence, can be said to constitute a misdirection, much less a material misdirection which may have led to the prejudice of the appellant.

The last misdirection on which Mr. Chari has relied is the statement of the learned Judge that the previous statements made by the girl which had been brought on the record do not constitute substantive evidence but are intended only to contradict the actual evidence given by her in Court. It appears that on behalf of the appellant the evidence given by the girl on a previous occasion had been brought out under section 145 of the Indian Evidence Act. In that statement the girl had sworn that Anil Chatterjee had sexual relations with her day after day and that she had sexual relations with others also. The girl admitted in her cross-examination that her statement had been recorded on a previous occasion by the Magistrate, Alipore, but when the contents of the statement were put to her, she said she did not remember whether she had made those statements or not. Now, it is clear that when a previous statement is put to a witness in cross-examination under section 145 of the Indian Evidence Act, its primary purpose is to contradict the witness by reference to the evidence he gives at the trial, and so, it cannot be said that the learned Judge was wrong in law in telling the jury that the previous statement on which the defence relied may help the defence to contend that the girl was not a straightforward witness and was changing her story from time to time, but the said previous statement cannot be treated as substantive evidence at the trial. That is the true legal position and no grievance can be made against the charge for stating the said position in the terms adopted by the learned Sessions Judge. Therefore, we do not think that the grievance made by Mr. Chari that the charge suffered from serious misdirections is well founded.

There is one more point which we may mention before we part with this appeal. After the verdict was returned by the jury, the learned Sessions Judge considered the question as to whether he should accept the said verdict, or should make a reference. In that connection, he observed that the verdict that the jury had returned against the appellant, was practically based on the uncorroborated testimony of the prosecutrix, but he thought that the said course adopted by the jury cannot be said to be illegal and he was not prepared to take the view that the verdict of the jury was in any way perverse. Mr. Chari contends that having regard to the general tone of the charge delivered by the learned Judge to the jury, the learned Judge should have treated the verdict as perverse and not acted upon it. We do not think that this contention can be accepted. In his charge, the learned Judge no doubt indicated that the evidence of the girl was not satisfactory, that it was not corroborated

and that there were other circumstances which showed that the prosecution case might be improbable, but having done his duty, the learned Judge had to leave it to the jury to consider whether the prosecution had established its charge against the appellant beyond reasonable doubt or not. The Jury apparently considered the matter for an hour and half and returned the unanimous verdict of guilty. In the circumstances of this case, we cannot accede to Mr. Chari's argument that the Sessions Judge was required by law to treat the said verdict as perverse. In a jury trial where questions of fact are left to the verdict of the jury, sometimes the verdicts returned by the jury may cause a disagreeable surprise to the Judge, but that itself can be no justification for characterising the verdict as perverse.

In the result, the appeal fails and is dismissed, the appellant to surrender to his bail bond.

K.L.B.

Appeal dismissed.

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INTERNATIONAL RELATIONS.

By

S. RAMASWAMY IYER.

Till the end of the Second World War the position of international relations may be stated to be on the whole that might was right and Governments and rulers who had the power used it to extend their empire, trade and wealth at the expense of less powerful people. The Roman Empire of a remote past, the Muslim Empire of a later age and the British Empire of recent history are illustrations and though the means and methods employed in these cases for acquisition and for preservation differed by reason of the influence of ideas prevailing among the people of the ruling country and in other parts of the world, in essence, the motive was domination and exploitation by subjugation.

'International law' in such a state of affairs in the world was obviously a misnomer because there was no law which the dominating nations or governments felt bound to observe or respect in securing their interests. Certain features of this long era of domination and empire have to be mentioned. First, the subject people were often weak and by their relations among one another courted domination by a stronger party. Indeed in many cases the domination would appear to have been inevitable. Second, the evil effects of imperial rule on the morale and economic condition of the people who were ruled have been often serious and tend to last even after the end of that rule. The methods employed by the rulers to retain and, if possible, to extend their empires are well-known. One of them was the 'divide and rule' policy to which subject people fell a prey on account of their differences arising from race, religion, or economic condition. Ulster, in Ireland, Pakistan in India and Katanga in the Congo are some illustrations of the legacies left by empires in the contemporary history of the world. Apart from these damaging effects of imperial policies, subject people suffer from being demoralised and rendered ineffective for social co-operation and harmony and economic and moral achievement. It is true, however, that they sometimes received benefits indirectly which they could not have obtained otherwise, such as internal and external peace and security, a system of law and justice and advantages like education that flow from conditions of order and stable government. Indeed the weaker people benefited in various ways by the association with a stronger and more socially advanced nation who ruled them. Third, the needs of imperial rule dictated a foreign policy, which was often inimical to the independence and welfare of other rulers and people. The security of Britain's Indian possession involved her in wars with rulers and people on the borders of India and on the land and sea routes to this country. Various reasons including her Empire made her statesmen take an active interest in maintaining the balance of power among nations in Europe and wars big and small could be traced to this circumstance. Lastly, empires like other man-made arrangements and creations share this great disability,—namely, mortality. They reach their end, sometimes by defeat by external enemies, sometimes by internal revolt or upheaval by the subject people striving for liberation. The latter cause has been very much in operation during the last fifty years, as freedom movements everywhere have received a great deal of support from forces released by the two World Wars.

In marked contrast with the history of international relations, the relations between members of a community or state have long ago arrived at a form of a civilised order and regulation. In a primitive society a sort of jungle law and the rule of force should have been the basis of life among its members but the need of law and order for the very existence of individuals and groups of them in course of time made the present position inevitable and law and order are now recognised as the basis of life

in civilized countries. Modern developments of this relationship are the observance of the Rule of Law and the democratic form of government.

The lesson to be drawn from this history of individual relationship in the countries of the world is that it is the result and corollary of the development of the power of the state to enforce law and order on its people. Similarly the lesson to be drawn from the different story of international relations is that the remedy for it is the development of the power and control of some supernational authority over the nations of the world.

While the above picture of the observance of law and order among the members of civilised communities or States is broadly true, it would be wrong to overlook the weak points in our civilisation as it now subsists. It is well-known that there are forces and factors which often tend to disturb or even to overthrow the peaceful relationship among the members or groups of them in a state or the relationship between the members or groups and the state or its authorities. This is true in a greater or less degree of many states at the present day, not excluding some reputed to be most advanced, wealthy or powerful. Among the disturbing forces or factors one of the most important or common is the disparity in the distribution of economic, social and political benefits among the people. There are also other factors like the difficulties created by differences in race, religion and language among the members of a state or by colour prejudice among them. These and other causes prevent any really integrated form of nationhood and a way of life among the people which is built upon regard and respect for one another's rights and can ensure a co-operative effort on their part to advance the common good. The unrest and discontent among the weaker, poorer or less privileged people are demonstrated in various ways such as labour troubles, violence and disorder and agitation and propaganda for upsetting the established order, social, political or economic. The unrest and discontent if not demonstrated on account of legal or other difficulties are nonetheless real and undeniable facts in the relations subsisting at the present day among people in several parts of the world. If we try to trace the deeper causes of this phenomenon, we have to recognise that there are urges, instincts and impulses in all of us which in effect are anti-social and destructive of the true relationship among people which ensures their peaceful or co-operative life in a community. Of such urges and instincts a very common and well-known instance is love of acquisition of the world's goods at the expense of others or of social or economic status superior to that of others. The satisfaction of this and other desires is often achieved without offending against the laws that prevail and sometimes with the help of such laws of which an instance is the complicated Company law. The satisfaction is sometimes achieved in spite of or in the teeth of controlling laws as in the case of smuggling and profiteering. This only shows that law is by itself inadequate for securing peace and an orderly, neighbourly and co-operative relationship among the people of a nation and the essential need for achieving such relationship is the general recognition and observance of various social and moral obligations and the corresponding rights of others. We are far from having reached the happy position of recognition of rights and duties or even an agreement among us about what these rights and duties are. Obviously they would depend on and vary with the circumstances in which particular people or communities are placed. To take an instance, there is no agreement and no chance of it under existing conditions of how to solve the problem of the great economic disparity which on all hands is acknowledged to be an evil feature of the social order, how to prevent certain people or groups of people from acquiring large fortunes or material resources and when such acquisitions are in fact made, how to deal with them with due regard to the rights of the acquirer.

When we speak of economic disparity among the people, our attention is usually focussed on the men who make fortunes beyond the reach of large numbers of their countrymen and therefore the State devises measures for mitigating the evil of disparity by taxation or other means of taking a part of their wealth and using it for the people as a whole. But the problem of disparity is not so simple as this might suggest. Alongside of people who work hard to acquire the world's goods, there are large numbers of others who cannot or will not work or make an effort to im-

prove their position. This may be due to natural or acquired incapacities, difficulties created by social or legal systems, environment or geography. Therefore the idea of economic equality among the people is not easy or simple to carry out and is linked with several aspects of human life and character.

If inequality is not easy to redress among the citizens of a nation, it is far more difficult when it prevails among nations. As it happens while some nations have attained a position of wealth and power by industry and the application of their energies, talents, and resources to achieve their objectives, there are several others who are very deficient in these qualities. Economic inequality among nations and its resultant evils are therefore likely to stay with us for quite a long time. All these are problems which have so far defied any solution or even a large measure of agreement about it among the people in various parts of the world. The upshot of this discussion about the state of relations among individuals or members of a nation is that the establishment of a settled government and a perfect system of law, justice and administration have not succeeded in securing peace and order and removing the causes of conflict, disorder and unrest among the members of most states in the world. It would follow that the operation of human desires, instincts and urges which defeats the purpose of established law and order in a nation will not fail to have the same effect even if an authority were established to enforce the Rule of Law in international affairs. The difficulties and conflicts, the unrest and discontent which arise from them will be there and produce the troubles in relations between different States and their governments or peoples. Since we have not reached the stage of establishing a Rule of Law among nations or an authority which could enforce it, the conflicts among them are even more frequent, large and dangerous than they are among the citizens of particular nations.

While causes of conflict among nations, such as economic disparity, are of long-standing, a new one has been added to them after the rise of Communism in Russia as a result of the Revolution of 1917 in that country. The spread of Communism in other parts of the world, the rivalry and conflict between the Capitalist and the Communist countries and the aggravation of the conflict after the Second World War in a form which has borne the name of a cold war are well-known facts of contemporary history. The leading participants in the cold war are the U.S.A. on the one hand and the U.S.S.R. on the other with other nations as their supporters. Neither the Capitalist nor the Communist system of Government and social regulation can be regarded as the last word in the management of the affairs of human societies but the followers of each of the systems have regarded its ideology as the only solution of the world's problems and consider the other system as a menace to the existence of their own. The result has been a great deal of hostility and adverse propaganda between the people placing their faith in the two ideologies. It is not surprising that this state of affairs should have serious evil effects on international relations. This is a subject which will be discussed later.

A great and epoch-making change in international relations ensued after the Second World War. This was the trend throughout the world towards the end of domination by empire and the liberation of subject peoples on the one hand and on the other the replacement of the rule of force by the rule of law among nations. The process of liberation has gone on steadily and colonialism has become thoroughly unpopular everywhere and has hardly a single person of note to defend it or plead for it at the present day. This is nothing short of a big land-slide in the history of human relations and heralds the beginnings of a new order and a new civilisation. The old order which has prevailed so far has been the use of force by States and their rulers to acquire new territory and build up and extend their empire. The necessary concomitants of this state of affairs have been frequent conflicts between ruler and ruled or the rulers and their rivals in the race for empire building, the growth of military power and the race in armaments, the undisguised assertion of the superiority of might over right in international relations. So we have a long and endless chronicling by historians of wars, conflicts and rivalries between nations and their Governments. The two World Wars could be traced to such causes. The German Kaiser's plan to open the Berlin-Baghdad Railway which Great Britain feared as a

threat to her Indian Empire was said to be one of the causes of the First World War. It is well-known that the race in naval armaments between Japan and the U. S. was the immediate provocation for the Second World War between them beginning with Japan's attack on the Pearl Harbour. Another corollary of the era of empire is the acquisition of wealth by imperial powers resulting in great economic disparity in the standards of life among the nations and peoples of the world. Their rulers, Governments and leaders regarded it as their first task to preserve and if possible to enhance the means of subsistence and the standard of life of their people and their efforts in this direction received strong support from the feelings of patriotism, self-respect and national honour and security of their people. These efforts in turn led to the building up of military power and to conflicts with other Governments resulting in several wars. The idea of domination by one people over another poisoned the relations of large sections of the people of the world and generated numerous evils to their life and morale.

Though the era of empire has ended, we have been witnessing during the last twenty years conflicts and tensions between nations often of a serious and menacing kind and this phenomenon rather shows that the end of empire and domination is by itself inadequate to preserve law and order or friendly and helpful relationship among them. A principal factor in producing the present tensions is the great economic disparity among nations and peoples in the world and the race among big nations for preserving their economic superiority and for this purpose the extension of their influence over the weaker and poorer nations in need of their help in various ways. What this influence means is illustrated by the efforts made by the U.S. on the one hand and by the Soviet Republic on the other. These are two great and powerful nations competing for influence of various kinds in different parts of the world. They are not on the quest for empire as colonial powers formerly were, but seek where possible to make military alliances with other countries and have military bases and where this is not possible, to have commercial treaties and friendly relations supported by economic aid and technical assistance in the sphere of industry, agriculture, food supply, education, health and various other aspects of national life. The case of China, another big nation, is different and her activities are definitely aggressive and objectionable. In the present discussion her relations with other countries do not bear much relevance. She has rather to be treated as a common enemy pursuing the path of aggressive domination and possession in the old style.

Though the new order of independent nations without the old evils of domination by others is generally accepted as normal international relationship, the continued prevalence of conflicts and tensions poses a problem for which no easy or ready solution can be found. The conflicts and tensions are the product of the phenomenon which we speak of as the cold war between the U.S.A. and the U.S.S.R. and their respective allies and supporters. Very soon after the end of the Second World War and the birth of the U.N.O., serious conflicts between these great powers began to affect the world. It is only a cold war and not a hot one involving large scale bloodshed as war between big powers in the era of empire did, but it has been productive of very many serious evils to the people of the world. It has been accompanied by a great deal of mental and emotional estrangement and ill-will, a great deal of provocative and menacing language and the use or abuse of large scale propaganda by either party to add to its own influence and to discredit the other. Intensive propaganda at home is of such a kind as to lead to mass indoctrination. The obvious consequence of this state of affairs on international relations is the absence of co-operation on various matters involving the general good of the world as a whole.

It is not therefore surprising that the noble aim of the establishment of the U.N.O. to bring about a new era of international peace and harmony and pave the way for the rule of law among nations has been considerably retarded and made difficult of achievement. Among the aims of the U.N.O. proclaimed in eloquent language in the Preamble to the Charter were the following : 'to save succeeding generations from the scourge of war, to reaffirm faith in equal rights of nations large

and small, to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security.' The Charter proceeded to state the purposes of the U.N.O. and some of them are 'to maintain international peace and security and to that end take collective measures for the prevention and removal of threats to peace, to bring about by peaceful means and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace'.

It is true and undeniable that the U. N. O. has on several occasions acted to prevent breaches of international peace or to stop such breaches when they occurred. The Suez dispute, the termination of the Korean War by the conclusion of a peace treaty and the trouble in the Congo are some of the more important instances of the beneficial operations of U.N. ; there have been several others. At the present moment the troubles in Cyprus and in the Yemen are in abeyance on account of U. N. intervention. Besides this contribution to world peace, the U. N. has been promoting friendly co-operation between nations in several matters, *e.g.*, health, food, labour economic and social relations. These are great services to the peoples of the world.

But it is also true and undeniable that U.N.O. has not been able to resolve the conflicts and tensions between big powers like the ones above mentioned which we speak of as the cold war. There have been also wars and bloody conflicts, big and small, among other nations in the world ; and in some of these conflicts the two powers and their allies, *e.g.*, the U.K., have openly or otherwise taken sides. It is not surprising that in this state of affairs international relations deteriorate and the deterioration assumes grave proportions at particular crisis and what is worse becomes a matter of concern to the world as the proper functioning of the U.N.O. is hampered and the confidence of the people in its efficiency and utility is badly shaken. A vital function of the U. N. is the decision of international disputes and it is entrusted to the Security Council whose proceedings not seldom are open to the charge of being partisan. We know very well the manner in which the sharp cleavages between powerful nations and Governments affect the just and impartial determination of international disputes and controversies. The same is the case when the function of decision is taken to the General Assembly when the issues are controversial and the national interest or sentiment of big powers is involved. This is not all. The belligerent powers are engaged in a competitive struggle to make alliances and treaties with governments all over the world, even though these governments and their leaders might have been parties to the commission of wrongs against international rights and justice. The immediate object is to add to their position of strength against their rivals for military or commercial purposes. Another motive is to add to their respective voting strength in the U.N.O.

These undesirable aspects of international relations have been causing immense harm to various people in the world. An instance is the case of India. The support which the U.S., the U.K., and their allies have been giving to Pakistan who invaded Kashmir in 1947 in the dispute with India arising out of the invasion has produced evils of a far reaching character. The result has been serious injury not merely to India but to the world order and the position and prestige of the U.N.O. This support has been the direct result of the cold war. It is with much regret that the present writer feels constrained to criticise the Governments and leaders of great nations in the present context. He is aware that they have acted in this matter as in others in order to safeguard what they have conceived to be their national interest. They have regarded Pakistan as a useful ally in their contest with the U.S.S.R. and other Communist countries. Pakistan invaded Kashmir in October, 1947, and even long before that as early as January, 1947, had organised raids by her nationals and by frontier tribesmen in search of loot on border areas in Kashmir. Kashmir was then an Indian State under its ruler like the hundreds of other States in India during British rule. Pakistan had first denied her responsibility for the invasion but later admitted to the U.N.C.I.P. that her army was operating in Kashmir. The ruler of the State who found himself and his State in imminent danger of destruction

by the invaders appealed to the Indian Government for military assistance and agreed to accede to India as he had a right to do under an Act of the British Parliament known as the Indian Independence Act, 1947. This Act provided for the measures to be taken for the withdrawal of British power from the whole of India and the transfer of that power to two independent Dominions then created out of undivided India—India and Pakistan. Under this Act an Indian State could accede to either of the two dominions and on the execution of the instrument of accession by its ruler, the State became an integral part of the Dominion to which he acceded. Some of the States acceded to Pakistan and most others to India. When the Ruler of Kashmir executed the instrument of accession, the Indian Government was acting lawfully in entering Kashmir for its defence and was successful in repelling the invaders from a large part of it. The authorities of the U.N. had pronounced the invasion to be a violation of international law. It is well-known that the invasion was accompanied by large scale cruelties, loot and other outrages on the unoffending population not excluding Muslims for whose benefit Pakistan professed to want Kashmir. In spite of these facts, the attitude of the U.S. and the U. K. in the Security Council of the U.N. to which India complained of the invasion by Pakistan, was surprising and far from just or reasonable. They used their influence to prevent the Council from taking the only legitimate course in the present case, (*viz.*) to declare Pakistan an aggressor and direct her to vacate the territory remaining in her unlawful occupation and render reparation to the State of Kashmir and its people. Very different was the action taken by the Council. It accepted the demand of Pakistan for a plebiscite to be held to determine whether the people wanted to accede to India or to Pakistan. It was said that it was to be "a free and impartial" plebiscite. One cannot help saying that these epithets would be nothing short of a mockery in view of what as is well-known would happen not merely in Kashmir but in also the rest of the country on the holding of a plebiscite or even on the announcement of it. A scene of chaos and confusion attended with bloodshed not unlike the events that followed on the partition of India in 1947 would not be unlikely at all in view of the animus and ill-will that have been worked up by Pakistani leaders among their people. If the forecast of what would happen in the years following immediately on the Security Council resolution is not an improbable one, much worse would be the position after the military alliance of Pakistan with the U.S. resulting in the large influx of arms and finance from the latter to the former country. In any case it would be a strange demand on India to agree to a course of action fraught with grave danger to the peace and stability of the whole country and her people and to make this demand more than sixteen years after 1948 or 1949 the time when it was contemplated that the Security Council's resolution had to be carried out and after the failure by Pakistan during all these years to fulfill the conditions attached to the plebiscite resolution and considered essential therefor. There has been a talk of plebiscite under U. N. protection but how unreal it is, is seen from the countless violations by Pakistan of the U. N. cease-fire line in Kashmir and the frequent incursions, firing and killing and sabotage in Kashmir by Pakistani troops and nationals. The Security Council has done nothing so far during these years to prevent a repetition of these provocative incidents and the old tale goes on. These incidents as well as the ill-treatment of the non-Muslim minorities in East Pakistan as a result of which there has been a mass exodus on their part to India under conditions of great misery and suffering would have been formerly a sufficient cause of war but the injured nation and people now submit to the rule of the U.N. and expect protection from it. If this protection is not forthcoming, the position is really bad for them at the present day. This is another very untoward result of the cold war.

The support of the western powers to Pakistan, an aggressor country has not merely made any just or proper settlement of her dispute with India impossible but has resulted in continued tension and menace of further aggression on the part of the former and the consequent need for large expenditure on the defence of India. This in turn has led to the imposition of heavy tax burdens on her poor people who have been struggling after their independence from foreign rule to improve their standard of living which is known to be very low. Another grave injury to the

people is the repercussion which the tension and atmosphere of dispute and ill-feeling have on the social and political life of the people of whom fifty millions are Muslims. The Indian Government and leaders are striving to achieve the difficult task of national integration and how could this be done when a Muslim State who is her neighbour promotes a state of fanatical frenzy among her own people. It must be remembered that Muslims in both States were fellow subjects of an undivided India only 17 years ago and there should have been ties of relationship, sympathy and fellow-feeling among many of them. Another matter about which India has a real cause for complaint against western powers is the manner in which they have by partisan propaganda obscured the true facts of the Kashmir dispute and have tried to influence world opinion against India. These are no doubt serious injuries to India but the course of action which the western powers have persuaded themselves to take does great harm to the position, efficacy and utility of the U.N.O. which they took a principal part in establishing after the last war and indeed cannot fail in the long run to do harm to their own prestige and the confidence which the world should naturally be expected to repose in nations whose achievements in the material and moral spheres of individual and collective life should give them a title to leadership. All these evils are the direct result of the cold war which has made it necessary for the U.S., U.K., and other nations to seek the alliance of aggressors and wrong-doers.

Before parting from this subject, it is necessary to mention that the U. K. has a special responsibility for the evils above-mentioned. The divide and rule policy of British rulers and their active encouragement of dissident communities and interests culminating in the partition of India and the creation of Pakistan brought about a great deal of ill-will between the majority and minority communities and their spokesmen which did not abate but increased after the creation of a Muslim State, on which the Muslim League and its leaders had set their heart. The proof of the deep-seated ill-will against India was shown immediately on the partition in 1947 by invasion of Kashmir and the Punjab riots; and in more recent years Pakistan's alliance with China and her giving away to the Chinese rulers a part of the Kashmir territory in her unlawful occupation. These are some of the legacies of British rule in India aggravated by the exigencies of the cold war.

The case of India has been mentioned with some fulness but similar or worse evils have overtaken other parts of the world since the cold war began. The division and conflict between the Communist and non-Communist groups of people in several countries and the support of them by the respective big powers have occasioned wars and clashes of a sanguinary character; e.g., as in Korea and Vietnam.

The unfortunate consequence of the cold war has been the exclusion of the Communist Republic of China from the membership of the U. N. and of the place which its government has the right to occupy as one of the six permanent members of the Security Council. This as well as the continued occupation of that place by the previous government having its seat in Formosa is the result of the very definite attitude of the U.S. and her supporters. Several countries including India have pleaded for the entry of Communist China in the U. N. but so far in vain. This was if one may say so with respect to the views to the contrary, clearly an error, which has probably encouraged the conduct of China much in the manner of an outlaw. More serious than the previous error of the U.N. is its present one in failing to take any action to prevent China from invading other territory like that of India or carrying on the work of disruption in several parts of the world notably in S.E. Asia. If the U. N. functioned as it was expected to do, it should have been able to take action to prevent China's invasion and occupation of parts of Indian territory two years ago and to settle the border dispute between the two countries. Instead of intervention by a world organisation the task of settlement has been attempted by the leaders of some friendly countries,—known as the Colombo Powers, but so far without success as China refuses to accept their advice. Thus we have the sad spectacle of the U. N. being immobilised for action to preserve the peace of the world.

Though a completely different order of international relationship was envisaged in the Charter of the U. N. O. and in the utterances of great statesmen, several undesirable aspects of the old order are still there in international relations;

e.g., fomenting trouble among other powers, military and financial support to belligerents; avowed partisanship with aggressors and wrong-doers and methods of espionage; subversion and revolt, even the planning of the elimination of inconvenient personages. These were methods adopted by the old imperial powers for preserving their empires and possessions but many of them persist even when the cult of empire and domination is defunct or obsolete in the view of large sections of people in the world. Why is this? The reason has already been indicated. Governments and national leaders consider it their duty or task to preserve and add to the wealth and resources of their countries and for this purpose, to maintain the military power of their nation.

Among the difficulties and troubles which are the product of the cold war, a serious one is the difficulty of nations other than the parties to the war in determining their attitude to these parties. The alternatives before other nations are usually expressed by the phrases alignment and non-alignment. We in India realise this difficulty very much and since our government has chosen the latter alternative the matter has become a bone of contention between the government and the opposition parties. There are risks in either course. Since the U. S. had long ago pressed India to align with her and enter into a military alliance with her to fight Communist aggression as Pakistan did in the early fifties, it is clear that by non-alignment India has lost the benefit of protection by a big power from external aggression such as has occurred by reason of the Chinese invasion and occupation of parts of Indian territory in the Himalayan region. On the other hand there are risks in the other course. By aligning with one of the parties to the cold war, India definitely makes herself an avowed adversary and a potential enemy of the other party. The government and the people of India find it difficult to reconcile themselves to this course of action when they desire to be friendly to both parties who are powerful, have large resources and quite active in enhancing their military strength and spheres of influence in the world. Before a country makes a treaty to join in the fight against Communist aggression it has to consider carefully the terms and obligations of such a treaty, such as the bilateral treaty between the U.S. and Pakistan or multilateral treaties like S.E.A.T.O. and C.E.N.T.O. We know also that the word 'aggression' is a term of uncertain import and in the hands of powerful propagandists capable of considerable elasticity. Even from the point of view of self-interest, a military alliance of a country with a big power does not absolve it from the need for developing adequate military strength to meet all emergencies and making the necessary sacrifices therefor. Any other course induced by reliance on outside help will spell ruin for the people who adopt it. Therefore there are risks in either course and the burden lies on the Government and the Parliament of India to make a decision and in doing so regard will naturally be had to practical considerations of need and advantage. Obviously neither alignment nor its opposite can be treated as an axiom or be turned into a slogan. There is one form of non-alignment which is necessary and is of a very different character from the one we are accustomed to speak of. That is the non-alignment by reason of the neutralisation of a country by agreement among the big powers, *e.g.*, Switzerland, Austria, Sweden.

The difficulties which the people all over the world encounter in international relations are no doubt quite disturbing but there are some silver linings in the cloud. With the end of the Second World War and the terrible suffering and devastation cast on practically the whole world, a new spirit sprang up in the minds of all people. The spirit was to prevent a repetition of this catastrophe and that by ending the era of empire and domination and entrusting the management of international affairs to a world body named the U.N.O. Though the achievement of its objects by the U.N.O. has not been found easy, a large element of strength for this purpose is developing and that is world opinion in favour of right dealing among nations and governments and the application of moral principles to their conduct and behaviour. There is no doubt that world opinion is a growing force in favour of the prevention of a major war as such a war would be a nuclear war and place the whole world in danger of mass destruction. An even more powerful cause of prevention has been the fear of the prospective belligerents about the consequences to themselves. These

and other causes have tended to abate the severity of the cold war. We all know that the tension between the two great powers has been reduced in recent years, especially after the Kennedy administration in the U.S.

The influence of world opinion on the policies and actions of nations and their governments cannot of course be ignored or underrated but it is undeniable that there are difficulties in relying on it on various occasions. One main difficulty is that many people are often not in a position to know the true facts on various disputes, as the propaganda methods of certain governments and agencies have been developed to a degree which enable them to outwit their rivals. The truth is often hidden behind a mass of propaganda material skilfully mobilised by interested parties. It has been said that in a war the first casualty is truth. This appears to be true of a cold war as well as of a hot war. In the matter of propaganda certain people have advantages. For instance, the English language is an instrument which is often used with the deadly effect by English-speaking people who have a large strength in numbers and resources. Under-developed and poor nations and their leaders, journalists and publicists are no match for them. The Soviet Republic is however fast catching up with her rivals and her publicity methods are quite modern, well developed and efficient. An instance of a party suffering from poor publicity is India in her disputes in regard to Kashmir and Goa. In influencing world opinion the more advanced countries have the advantage not merely of a press as well as leaders and statesmen who are experienced in the art of publicity but also of their people as a whole rallying to the task before them. Able and experienced men in all walks of life turn their talent, literary and artistic, to the production of books of historical value, fiction, paintings and pictures, to influence their own public and the people of the world generally. Less advanced people enjoying their new found freedom are naturally at a disadvantage. The cruelties, tragedies and treacheries which the invaders of Kashmir showed themselves to be capable of would afford sufficient material for the subject-matter of books, booklets, press articles and artistic reproductions but there has been in India no great effort in this direction. One cannot help saying that the intelligentsia of India has been culpably indifferent to its own interests and obligations. In regard to Goa which India was constrained to occupy out of defensive necessity, the U.S. and U. K. leaders maintained their thesis that India had violated the U. N. Charter. This is a contention that could be rebutted, but there was hardly any attempt to do so on the part of India's numerous men of legal and literary talent*. There have been many other instances of this kind or even worse in the recent history of international affairs and of the proceedings of the U.N.O. Therefore world opinion is under present conditions not always a reliable support for good causes or for the weak or injured parties in international conflicts.

We have been speaking of the cold war more than once and so do many others in the world. But it is strange, to say the least—that there is no authentic account of its origin and development during these years ; or any reliable material to show the part or responsibility of the parties to it. All we have is a mass of accusations and counter-accusations, charges and counter-charges, warnings and minatory language. Much smaller and less important events are investigated and the facts about them placed before the public but the cold war has so far not been the subject of historical description and chronicling by students of contemporary history who can make an impartial and objective examination of all the facts bearing on it. One reason for this is that impartiality is ruled out by the circumstance that countries which usually produce such men are involved in the cold war and it is difficult for them to escape the charge of bias. There are however some countries which are free from this difficulty and one of them is India. If some of her historians and publicists could engage in the task with the help of Universities or centres of study, they would be doing a service to the whole world as they would thereby place facts before it enabling a proper diagnosis of the major trouble which has been afflicting it for nearly twenty years. But unfortunately no such attempt has been made or even contemplated.

* On this subject the present writer's article in two legal journals the Supreme Court Journal and the Madras Law Journal (March, 1962) was to his knowledge a solitary effort outside the ranks of official spokesmen.

Undoubtedly the task of reserach on facts of various kinds, such as political reasons as well as commercial and economic data indicating the motives of words and acts on the political level would be by no means a light one but large and onerous. But the world would be the wiser for the probe into the history of the cold war.

Though the evils arising from the cold war are quite large, the world has been saved from far greater evils and damage by the end of the era of empire and the general awakening for the need of a new order. Formerly the imperial powers could gain their ends by the show of force or the use of it. In recent years great and powerful nations seek to extend their power and influence by friendly aid in various ways. The U.S. uses her wealth very generously for the benefit of the world and there is no precedent in the history of nations for her philanthropy. Other powers such as the U.S.S.R. and the U.K. have also been liberal in assisting people in need of aid. This is indeed a pleasant aspect of international relations in the post-war world. Besides, it is well known that both the U.S. and the U.S.S.R. have greatly aided the liberation of subject people from the rule of colonial powers.

The discussion in the preceding pages would lead us to the conclusion that while international relations have definitely moved to a higher plane than was possible in the old era of empire, these relations are marred by conflicts and rivalries which make co-operation between the great powers unavailable in the U.N.O. for the just determination of disputes and the enforcement of the rule of law among nations. The maintenance of national security in this state of affairs is a serious problem for all nations, especially the less developed and powerful among them. We in India are concerned about it as only recently we had a bad blow from China. The method of ensuring our security undertaken by our government and leaders is two-fold: first to strengthen our defences with the help of friendly nations, and second to make India's contribution to the removal or mitigation of the conflicts and tensions which have disabled the U.N.O. from functioning as it was designed to do. The first is the immediate and imperative task before the Government and the people of India and the measure of their success in it will obviously enhance the value of their contribution to advance the general good of the world. The problem of defence is a burden that lies primarily on the government and Parliament and it is for them to decide on the measures necessary for it. As everyone knows, it is not simply a question of raising armies or providing arms and equipment for them but is interwoven with several other matters, internal cohesion, higher production, the imposition of large financial burdens on the people and the proper expenditure of public monies, efficient conduct of administration and the democratic system of government. In these as in other matters relating to our national life the citizens of India, especially the intelligent and experienced among them have an important part to play by the regulation of individual and collective life and behaviour in conformity with common interest and in full realisation of the dangers that surround us. The removal of international conflicts and tensions and the better functioning of the U.N.O. are the objectives which our leaders have been steadily pursuing and will without doubt claim their close attention in the future also. In this task intelligent and educated citizens, especially those with learning, knowledge of public affairs and experience gained in various walks of life can render a great deal of assistance. People who are unconnected with political parties or with official positions have the obligation to make their disinterested contribution to the formation of a world opinion on international disputes and controversies. This is a very large field of work and we have to learn from the manner in which publicists and writers in the U.S. make an intensive study of such matters and present their views to the world at large. There are books in that country which deal in great detail with the work of the U.N.O., by reference to statistical data about the voting of different groups in it and discuss the methods by which the U.S. should take care of its interests and obtain the support of these groups. Whatever the future may yield, we have to do what we can to make our contribution for the better functioning of the U.N. which is at present the only source of hope for humanity for peace, justice and right among nations.

[SUPREME COURT.]

A. K. Sarkar, M. Hidayatullah and
J. R. Mudholkar, JJ.
16th March, 1964.

Hari Das v.
The State of West Bengal.
Cr. A. No. 141 of 1961.

Penal Code (XLV of 1860), section 211—False charge of “having committed an offence”
—If includes charge of having committed contempt of Court.

A charge of having committed a contempt of Court is a charge of having committed an offence within the meaning of section 211, Indian Penal Code. Such a charge was admittedly brought in this case and that charge was further more preferred to the only person who could act upon it, namely, the High Court, for without its sanction no complaint for lodging a false charge of contempt of Court could have been made. The order to lodge the complaint in regard to an offence under section 211 was unobjectionable.

Sarjoo Prasad, Senior Advocate (P. K. Chatterjee, Advocate with him), for Appellants.

Niharendu Dutt Majumdar, Senior Advocate (P. K. Chakrabarty and P. K. Bose, Advocates, with him), for Respondent No. 1.

S. C. Majumdar, Advocate, for Respondents Nos. 2 to 4.

G. R.

Appeal dismissed.

[SUPREME COURT.]

Raghubar Dayal, N. Rajagopala
Ayyangar and J. R. Mudholkar, JJ.
18th March, 1964.

Mahendra Manilal Nanavati v.
Sushila Mahendra Nanavati.
C.A. No. 166 of 1963.

Hindu Marriage Act (XXV of 1955), section 12 (2) (b)—Petition for annulment of marriage—Evidence—Admission of parties—If can be acted upon.

By Majority.—Section 12 (2) (b) of the Hindu Marriage Act provides that no petition for the annulment of the marriage shall be entertained unless the Court be satisfied that the petitioner was at the time of marriage ignorant of the facts alleged and that no marital intercourse with the consent of the petitioner had taken place since his discovering the existence of the grounds for the decree. Such a finding necessarily implies that before reaching it the Court has satisfied itself that there had been no connivance of the petitioner in the coming into existence of the ground on which he seeks annulment of the marriage. Besides, section 23 also provides that the Court can pass a decree only if it is satisfied that any of the grounds for granting relief exists, that the petition is not presented or prosecuted in collusion, with the respondent and that there was no legal ground on which the relief claimed could not be granted.

The Court can arrive at the satisfaction contemplated by section 23 on the basis of legal evidence in accordance with the provisions of the Evidence Act and it is quite competent for the Court to arrive at the necessary satisfaction even on the basis of the admissions of the parties alone. Admissions are to be ignored on grounds of prudence only when the Court, in the circumstances of a case, is of opinion that the admissions of the parties may be collusive. If there be no ground for such a view, it would be proper for the Court to act on those admissions without forcing the parties to lead other evidence to establish the facts admitted, unless of course the admissions are contradicted by the facts proved or a doubt is created by the proved facts as regards the correctness of the facts admitted.

S. T. Desai, Senior Advocate (S. Singhvi, Advocate, and J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant.

Purushottam Trikamdas, Senior Advocate (M. H. Chatrapati and I. N. Shroff, Advocates, with him), for Respondent.

G. R.

Appeal allowed; marriage annulled.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar
and S. M. Sikri, JJ.
20th March, 1964.

The Hyderabad Chemical and
Pharmaceutical Works, Ltd. v.
The State of A.P.
C. As. Nos. 399-403 of 1962.

Hyderabad Medical Preparations and Spirituous Rules, 1345-F, Rule 36—Repealed by 1956 Rules under Medicinal and Toilet Preparations (Excise Duties) Act, 1955.

As the 1956 Rules under Medicinal and Toilet Preparations (Excise Duties) Act, 1955, show it is the duty of the supervisory staff attached to a bonded manufactory to see that the manufacture is properly made and that alcohol supplied is not diverted to any use except that of the manufacture of the preparation. This being the purpose of the 1956 Rules, the levy under rule 36 of Hyderabad Medical Preparations and Spirituous Rules of 1345-F cannot be justified on the ground that under that rule the supervisory staff has to see that the general law relating to the alcohol and intoxicating drugs is not violated. There is no doubt that the field covered by rule 36 of the 1345-F Rules is completely covered by the Rules framed under the Medicinal and Toilet Preparations (Excise Duties) Act and therefore rule 36 can no longer be justified as good under the general law relating to alcohol and intoxicating drugs. We may add that the Act or the 1956 Rules make no provision for such charge as is provided in rule 36 of 1345-F Rules, the intention being that the duty under the Act will cover all expenses for enforcing it. The fact that members of the supervisory staff are the servants of the respondent makes no difference because they function under the Act and the Rules framed thereunder and not under the Hyderabad Act. Reading section 21 of the Act and rule 143 of the Rules framed thereunder, rule 36 of 1345-F Rules must be held to have been repealed and it is not saved by the proviso to section 21.

K. Srinivasamurthy and Naunit Lal, Advocates, for Appellants (In all the Appeals).

K. R. Chaudhuri and B. R. G. K. Achar, Advocates, for Respondents (In all the Appeals).

G.R.

Appeals allowed.

[SUPREME COURT.]

A.K. Sarkar, M. Hidayatullah and
J. R. Mudholkar, JJ.
20th March, 1964.

Misrilal Parasmal v.
H. P. Sadasiviah.
C.A. No. 531 of 1963.

Mysore House Rent and Accommodation Control Act, 1951, section 8 (2) (ix) and (x)—Reasonable and bona fide requirement—Finding as to bona fides—If open to interference in revision.

Since it was essential for the landlords to establish their *bona fides* so as to be able to take advantage of the statutory provisions, the question of jurisdiction was involved and therefore it was open to the High Court to go into that question in revision. Sub-section (1) of section 8 of the Mysore House Rent and Accommodation Control Act provides that notwithstanding anything contained in any agreement or law to the contrary, a tenant shall not be evicted whether in execution of a decree or otherwise except in accordance with the provisions of this section or those of section 7-C. Sub-section (2) provides that a landlord who seeks to evict a tenant in possession shall apply to the Court for a direction in that behalf. This section empowers the Court to grant such permission if it is satisfied that one of the several circumstances set out in that sub-section exists. One of those circumstances is set out in clause (ix) of that section, which runs thus :

“That the house is reasonably and *bona fide* required by the landlord for carrying out repairs or reconstruction which cannot be carried out without the house being vacated;.....”

Thus jurisdiction is conferred upon the Court to order eviction of the tenant upon its satisfaction as regards the *bona fide* requirement of the landlord to obtain

possession of the house. Thus the condition which confers jurisdiction upon the Court is its satisfaction about the *bona fide* requirement of the landlord. If the Court is not satisfied about such requirement of the landlord it will have no jurisdiction to make an order with the aid of that clause. If, however, it says that it is satisfied it cannot be regarded as having committed an error pertaining to jurisdiction merely because it may have formed a wrong conclusion as to the *bona fides* of the landlord in requiring possession of the house. No illegal assumption of jurisdiction is involved in arriving at a wrong finding on the matter.

K. Jayaram and R. Ganapathy Iyer, Advocates, for Appellant.

A. Ranganadham Chetty, Senior Advocate (*A. V. Vedavalli* and *A. V. Rangam*, Advocates, with him), for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C. J., K. N. Wanchoo, Maharaj Kumar Tokendra Bir Singh v. J. C. Shah, N. Rajagopala Ayyangar The Secretary to the Government of India, Ministry of Home Affairs. and S. M. Sikri, J. J.
23rd March, 1964. Writ Petition No. 123 of 1963.

Civil Procedure Code (V of 1908)—Section 87-B—Requirement of consent of Central Government for suit against ex-Ruler of former Indian States—Validity.

Section 87-B of the Civil Procedure Code must be regarded as constitutionally valid.

In the instant case the Central Government had accorded consent to the petitioner to file his suit and when that is done, the power conferred on the Central Government by section 87-B has been exercised. The further direction contained in the order that consent would not be accorded in respect of properties mentioned in Schedules B, C, D and X, is clearly invalid. The authority conferred on the Central Government under section 87-B is, out of tune with the equality before law which is guaranteed by Article 14; and it may even affect the litigants' fundamental rights under Article 19 (1) (f) and (g), and so, it would be necessary for the Courts to examine the validity of the orders passed under section 87-B, whereby consent has been refused in part only, with meticulous care. The order passed by the Central Government in the instant case should be construed as an order according consent to the institution of the suit which the petitioner proposes to file and treat the latter portion of the order in regard to the properties described in Schedules B, C, D and X as being invalid.

S. C. Agarwal, R. K. Garg, D. P. Singh and M. K. Ramamurthi, Advocates, of *M/s. Ramamurthi & Co.*, for Petitioner.

S. V. Gupte, Additional Solicitor-General of India (*R. Thiagarajan* and *R. H. Dhebar*, Advocates, with him), for Respondents.

G.R.

Petition allowed.

[SUPREME COURT.]

P. B. Gajendragadkar, C. J., K. N. Wanchoo, Radhey Shyam Sharma v. J. C. Shah, N. Rajagopala Ayyangar The Post Master-General, Central Circle, Nagpur. and S. M. Sikri, J. J.
23rd March, 1964. Writ Petition No. 208 of 1963.

Essential Services Maintenance Ordinance (I of 1960), sections 3 to 5—Article 19 of the Constitution.

Under Article 19 (1) (a) of the Constitution all citizens have the fundamental right to freedom of speech and expression and under clause (1) (b) to assemble peaceably and without arms. Reasonable restrictions of these fundamental rights can be placed under the conditions provided in clauses (2) and (3) of Article 19. Sections 3 to 5 of the Essential Services Maintenance Ordinance

do not violate the fundamental rights enshrined in sub-clauses (a) and (b) of Article 19 (1). A perusal of Article 19 (1) shows that there is no fundamental right to strike, and all that the Ordinance provides is with respect to an illegal strike as provided in the Ordinance. (See *All India Bank Employees' Association v. National Industrial Tribunal*, (1962) 3 S.C.R. 269, 292). There is no provision in the Ordinance which in any way restricts freedom of speech and expression, nor is there any provision therein which restricts any one from assembling peaceably and without arms. The Ordinance thus has nothing to do with restricting the fundamental rights enshrined in sub-clauses (a) and (b) of Article 19 (1), and there is therefore no necessity of even considering whether the provisions of the Ordinance can be justified under clauses (2) and (3) of Article 19.

B. D. Sharma, Advocate, for Petitioner.

S. V. Gupte, Additional Solicitor-General of India (S. P. Varma and R. H. Dhebar, Advocates, with him), for Respondents.

G.R.

Petition dismissed.

[SUPREME COURT.]

K. Subba Rao, K.C. Das Gupta and
Raghubar Dayal, JJ.
23rd March, 1964.

Kanumukkala Krishnamurthy *alias*
Kaza Krishnamurthy v.
The State of A.P.
Crl. A. No. 134 of 1962.

Penal Code (XLV of 1860), sections 415, 419, 420 and 465—Sections 241, 264, 266, Government of India Act, 1925—Article 320 of the Constitution.

Misrepresentation by the candidate to the Service Commission continued and persisted till the final stage of the Government passing an order of appointment and therefore the Government itself was deceived by the misrepresentation he had made in his application presented to the Service Commission.

The fact that the Service Commission is an independent statutory authority has no relevant bearing on this question. It is a statutory body as it is constituted under the provisions of a statute. It is independent of the Government in the sense that in its selection of candidates or in its tendering advice to the Government it does not take any hint or instructions or clue from the Government. It brings to bear its own independent mind to judge the comparative merits of the candidates and their suitability to the posts they apply for. Its function is to advise the Government on the suitability of the candidates. It is therefore a statutory adviser to Government in the matter of appointment to the Services. Deception of such an adviser is deception of the Government which is expected to pay heed to its advice and act accordingly.

A. S. R. Chari, Senior Advocate (G. D. Gupta and S. Balakrishnan, Advocates, and R. K. Garg, S. C. Agrawala, D. P. Singh and M. K. Ramamurthi, Advocates, of M/s. Ramamurthi & Co., with him), for Appellant.

S. G. Patwardhan, Senior Advocate (B. R. G. K. Achar, Advocate, with him), for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

M. Hidayatullah and N. Rajagopala
Ayyangar, JJ.
24th March, 1964.

Ibrahim v. The State of Rajasthan.
Cr. A. No. 14 of 1963.

Foreigners Act (XXXI of 1946), (Amended by Central Act) (XI of 1957), sections 3 and 14—Scope.

A *prima facie* reading of the Foreigners Act would show that if on the date when the offence is committed a person is a "foreigner", as defined by the Act, it would be no excuse for him to say that on an earlier date he was not a foreigner. But

in the instant case there is no proof on the record that the appellant entered India before 19th January, 1957. The appellant was deported to Pakistan in April, 1957, and so he could have come over to India only subsequent to April, 1957 and if he did come over without a passport, after April, 1957, by which date section 2 (a) of the Foreigners Act containing the definition of "Foreigner" had been amended, the appellant was a foreigner when he came into India without a valid passport and visa in contravention of the provisions of section 3 of the Foreigners Act.

S. Shaikat Hussain, Advocate, for Appellant.

H. R. Khanna and S. P. Nayar, Advocates, for Respondent.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar and
S. M. Sikri, JJ.
25th March, 1964.

The State of Mysore v.
M.H. Bellary.
C. A. No. 677 of 1963.

Bombay Civil Services Rules, Rule 50 (b)—Article 309 of the Constitution.

If there was a breach of a statutory rule framed under Article 309 or which was continued under Article 313 of the Constitution in relation to the conditions of service the aggrieved Government servant could have recourse to the Court for redress.

Even assuming that it was a case where the Government servant had a lien and his lien had not been suspended it is difficult to see what logic there could be in interpreting the rule as providing different criteria in the two cases. Where the lien is suspended the rule speaks of the "post or posts, if any he would have held if his lien had not been suspended". By the use of the plural, it is clear that the rule contemplated the suspended lien being transferred from one post to another, in other words, to a promotion from one post to another during the period of the service in another department. If there was any ambiguity in what the rule meant it is wholly dispelled by reference to the circular which ensures to the officer on deputation in another department that he shall be restored to the position he "would have occupied in his parent department had he not been deputed". There was no ambiguity in the wording of this circular which gives proper effect to the provisions of rule 50 (b).

B. R. L. Iyengar and B. R. G. K. Achar, Advocates, for Appellant.

S. K. Venkataranga Iyengar, M. Rama Jois and A. G. Ratnaparkhi, Advocates, for Respondents.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J., K. N. Wanchoo,
J. C. Shah, N. Rajagopala Ayyangar and
S. M. Sikri, JJ.
25th March, 1964.

V.S. Rice & Oil Mills v.
State of A.P.
C.As.Nos. 429-439, 591, 592, 597,
689, 694, 724, 725 and 727 of
1962 and 15, 139, 140, 159, 267 to
269, 331, 334, 337, 340, 342, 343, 347,
352, 389, 746 and 748 of 1963.

Madras Essential Articles Control and Requisitioning (Temporary Powers) Act (XXIX of 1949)—Defence of India Rules, Rule 81 (2)—Articles 14 and 19 of the Constitution of India (1950).

The concept of fair prices to which section 3 (1) of Madras Act (XXIX of 1949) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a

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fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. That is why we do not think Mr. Setalvad is right in contending that even though the respondent may have the power to regulate the price at which electrical energy should be supplied by it to the appellants, it had no power to enhance the said price. We must therefore, hold that the challenge to the validity of the impugned notified orders on the ground that they are outside the purview of section 3 (1) cannot be sustained.

We ought to make it clear that there has been no suggestion before us that the prices fixed by the impugned notified orders are, in any sense, unreasonable or excessive, and it is significant that even the revised tariff has to come into operation prospectively and not retrospectively. Therefore, having regard to all the circumstances in this case, we are disposed to hold that the change made in the tariff by the notified orders must be held to be reasonable and in the interests of the general public.

When a citizen wants to challenge the validity of any statute on the ground that it contravenes Article 14, specific, clear and unambiguous allegation must be made in that behalf and it must be shown that the impugned statute is based on discrimination and that such discrimination is not referable to any classification which is rational and which has nexus with the object intended to be achieved by the said statute. Judged from that point of view, there is absolutely no material on the record of any of the appeals forming the present group on which a plea under Article 14 can even be raised.

T. V. R. Tatachari, Advocate, for Appellants (In C.As. Nos. 429-434 and 694 of 1962 and C.A. No. 269 of 1963).

M. C. Setalvad, Senior Advocate, for Appellants (In C.As. Nos. 438-439 of 1962).

M. C. Setalvad, Senior Advocate, for Appellants (In C.As. Nos. 436, 437, 724, 725, 727 of 1962).

K. Srinivasamurthy, for Appellants (In C.As. Nos. 591, 592, 597 and 689 of 1962 and 140, 267 and 268 of 1963).

K. Jayaram, Advocate, for Appellants (In C.As. Nos. 139, 159, 331, 334, 337, 340, 342, 343, 347, and 352 of 1963).

K. R. Chaudhuri, Advocate, for Appellants (In C.As. Nos. 15 and 389 of 1963).

A. Vedavalli and *A. V. Rangam*, Advocates, for Appellants (In C.As. Nos. 746 and 748 of 1963).

D. Narasaraju, Senior Advocate, for Respondents. (In C.A. Nos. 435 to 437, 724, 725 and 727 of 1962 429-434, 438, 439 and 694 of 1962 and 269 of 1963, 581, 597 and 689 of 1962, and 140, 267 and 268 of 1963) and Respondent No. 1 (In C.A. No. 592 of 1962 and 15, 139, 331, 334, 337, 340, 342, 343, 347, 352, 159, 389 and 746 to 748 of 1963).

J. V. K. Sarma, Advocate, for Respondent No. 2 (In C.A. No. 592 of 1962).

G.R.

Appeals dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J.
K. N. Wanchoo and K. G. Das Gupta, JJ.
25th March, 1964.

The Labour Commissioner, M.P. v.
The Burhanpur Tapti Mills Ltd.
C.A. No. 529 of 1963.

Central Provinces and Berar Industrial Disputes and Settlement Act (1947) sections 42 (1) (g), 41, 16 (3), 42 to 45—Illegal strike—Standing Orders—"Rendered illegal"—"Held illegal"—Jurisdiction to decide question of legality or illegality of a strike.

The words "rendered illegal" does not mean "held illegal" and the employer is free to take action against the employee as soon as he thinks that the strike in which he has participated comes within the provisions of section 46 of the Central Provinces and Berar Industrial Disputes and Settlements Act.

The State Industrial Court or a District Industrial Court is not bound to give any decision at all on application by any party other than the State Government. There being thus cases where the authorities mentioned in section 41 may refuse to decide the question of legality or illegality of a strike, it is not possible to say that exclusive jurisdiction is given by section 41 to these authorities to decide the question of legality or illegality of a strike. It is reasonable to hold therefore that for performing its functions under section 16 (3) of the Act the Labour Commissioner has jurisdiction to decide the question of legality or illegality of a strike when that question is raised before it.

I. N. Shroff, Advocate, for Appellant.

M. C. Setalvad, Senior Advocate, for Respondent No. 1.

M. S. K. Sasri, Advocate, for Respondent No. 2.

G.R.

Appeal dismissed.

[SUPREME COURT.]

P. B. Gajendragadkar, C.J.,
K. N. Wanchoo and K. C. Das Gupta, JJ.
25th March, 1964.

The Management of Bombay Co.,
(P), Ltd., Cochin v. The Workmen of
Bombay Co. (P), Ltd.
C.A. No. 583 of 1963.

Industrial Dispute—Bonus—Full Bench formula.

The tribunal was wrong in the instant case in holding that an inference could be drawn for payment of bonus as an implied condition of service in the circumstances of the present case when the payment was not uniform in the past even though it was not connected with any festival.

It can be inferred from the evidence on the record that the payment in the present case is connected with Christmas festival. Therefore even though the tribunal was wrong in holding that the payment need not be connected with any festival in a case like the present where the rate has not been uniform, the respondents have made out a case of payment of some bonus as an implied condition of service connected with a festival. An implied condition of service between the appellant and its workmen that something would be paid every year about Christmas time as festival bonus was established on the evidence in the instant case.

Therefore even though the tribunal may be justified in awarding a reasonable amount as festival bonus once it is proved that something has to be paid as an implied condition of service towards such bonus, it cannot be said in this case that the tribunal was justified in giving anything beyond the minimum for this was a year of loss. (The amount awarded as festival bonus for the year 1958-59 was reduced to one month's salary.).

G. B. Pai, Advocate, and J. B. Dadachanji, O. C. Mathur, and Ravinder Narain Advocates of M/s. J. B. Dadachanji & Co., for Appellant.

Janardan Sharma, Advocate, for Respondents.

G.R.

Appeal partly allowed.

[SUPREME COURT.]

*K. Subba Rao, K. C. Das Gupta and
Raghubar Dayal, JJ.*
26th March, 1964.

*K.V. Narayanaswami Iyer v.
K. V. Ramakrishna Iyer.*
C.A. No. 589 of 1960.

Hindu Law—Joint family property—Test—Nucleus—Necessity—Partition—Karta—When liable to account.

The legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown. *Vide Amritlal Sen and others v. Surath Lal Sen and others*, A.I.R. 1942 Cal. 553, and *Appalaswami v. Suryanarayanamurthy and others*, (1947) 2 M.L.J. 138 : I.L.R. 1948 Mad. 440 (P.C.).

In the case before us, it is not disputed that the acquisitions in the name of the first defendant's wife were made with funds advanced by him. As regards the acquisitions in the name of the third defendant and his minor son the sixth defendant also we find it reasonable to hold from the evidence, as regards the earnings of the third defendant and other circumstances, that for these acquisitions also money was paid by the first defendant. The question, whether the joint family had at the time of each of these acquisitions sufficient nucleus from which the acquisition could have been made is therefore of great importance.

There was no nucleus from the joint family properties which the first defendant could have possibly used in making the acquisitions during 1941 and 1942. The conclusion of the High Court that these properties did not belong to the joint family and are therefore not liable to partition cannot therefore be disturbed.

Where, as in the present case, the evidence already adduced before the Court shows *prima facie* that the Karta could not reasonably be expected to have in his hands at the date of the suit any accumulation worth the name in addition to the immovable properties found on evidence to have been acquired for the family, there can be no justification for calling the Karta to account for his past dealings with the joint family property and its income. In the circumstances of this case therefore the order of the High Court that there was no liability on the first defendant as managing member to render any account of any kind prior to the 12th December, 1946, on which notice demanding partition was issued, does not call for any modification.

K. N. Rajagopal Sastri, Senior Advocate, for Appellant.

A. V. Viswanatha Sastri, Senior Advocate, for Respondents Nos. 1, 3, 4 and 6 to 8.

B. Kalyana Sundaram, Advocate, for Respondent No. 2.

G.R.

Appeal dismissed.

[SUPREME COURT.]

*K. N. Wanchoo, M. Hidayatullah,
K.C. Das Gupta, and N. Rajagopala Ayyangar, JJ.*
29th April, 1964.

*Jagdish Chandra Gupta v.
Kajaria Traders (India) Ltd.*
C.A. No. 791 of 1962.

Arbitration Act (X of 1940), section 8 (3)—Scope—"Other proceeding"—Construction.

In our judgment, the words "other proceeding" in section 8 (3) of the Arbitration Act must receive their full meaning untrammelled by the words 'a claim of set-off'. The latter words neither intend nor can be construed to cut down the generality of the words 'other proceeding'. The sub-section provides for the application of the provisions of sub-sections (1) and (2) to claims of set-off and also to other proceedings of any kind which can properly be said to be for enforcement of any right arising from contract except those expressly mentioned as exceptions in sub-section (3) and sub-section (4).

G.R.

Appeal allowed.

and that there were other circumstances which showed that the prosecution case might be improbable, but having done his duty, the learned Judge had to leave it to the jury to consider whether the prosecution had established its charge against the appellant beyond reasonable doubt or not. The Jury apparently considered the matter for an hour and half and returned the unanimous verdict of guilty. In the circumstances of this case, we cannot accede to Mr. Chari's argument that the Sessions Judge was required by law to treat the said verdict as perverse. In a jury trial where questions of fact are left to the verdict of the jury, sometimes the verdicts returned by the jury may cause a disagreeable surprise to the Judge, but that itself can be no justification for characterising the verdict as perverse.

In the result, the appeal fails and is dismissed, the appellant to surrender to his bail bond.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. N. WANCHOO AND K. C. DAS GUPTA, JJ.

Darya Singh and others

.. *Appellants**

v.

The State of Punjab

.. *Respondent.*

Criminal Trial—Evidence of interested and hostile witnesses—Whether as a matter of law cannot be accepted without corroboration—Criminal Procedure Code (V of 1898), section 540—Scope of.

On principle, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars. It is not possible to hold that such witnesses are no better than accomplices and that their evidence, as a matter of law, must receive corroboration before it is accepted.

It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the Court in reaching a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses, who, in his opinion have not witnessed the incident, but normally he ought to examine all the eye-witnesses in support of his case. It may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness-box. If at the trial it is shown that the persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case, if the ends of justice require, the Court may even examine such witnesses, by exercising its powers under section 540 of the Criminal Procedure Code (V of 1898); but to say that in every murder case, the Court must scrutinise the police diary and make a list of witnesses whom the prosecutor must examine, is virtually to suggest that the Court should itself take the role of a prosecutor. The powers of the Court under section 540 of the Code can and ought to be exercised in the interests of justice, whenever the Court feels that the interests of justice so require, but that does not justify the contention that the failure of the Court to have exercised its powers under section 540 has introduced a serious infirmity in the trial itself.

Appeal by Special Leave from the Judgment and order dated 24th August, 1961, of the Punjab High Court in Criminal Appeal No. 146 of 1961.

T. R. Bhasin, Advocate, for Appellants.

Gopal Singh and *P. D. Menon*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The three appellants, Darya Singh, Rasala and Pehlada, along with their brother Ratti Ram were tried by the learned Sessions Judge, Patiala, under section 302 read with section 34 of the Indian Penal Code for having committed the murder of Inder Singh in the village of Petwar in the early hours of the

morning of the 2nd June, 1960. The learned Sessions Judge acquitted Ratti Ram, because he held that the case against him had not been proved beyond a reasonable doubt. He, however, convicted the three appellants and sentenced them to imprisonment for life. This order of conviction and sentence was challenged by the appellants by preferring an appeal before the Punjab High Court. The High Court agreed with the conclusion of the learned trial Judge and dismissed the appeal. The acquittal of Ratti Ram was challenged by the State but the State's appeal was dismissed and Ratti Ram's acquittal was confirmed. The appellants have come to this Court by Special Leave and on their behalf, Mr. Bhasin has contended that the High Court was in error in confirming the order of conviction and sentence passed against the three appellants by the trial Judge.

The facts leading to the prosecution of the appellants lie within a very narrow compass. It appears that on 2nd June, 1960, before sun-rise the victim Inder Singh was returning towards his house after relieving himself of the call of nature. When he came near the Baithak of Kishan Lal Jat, he was suddenly attacked by the three appellants. Darya Singh had a lathi and Rasala and Pehlada had a gandasa each. The prosecution had alleged that Ratti Ram had also joined in that act. All the assailants inflicted serious injuries on Inder Singh as a result of which he died. While he was being assaulted, Inder Singh raised an alarm in consequence of which his brother Dalip Singh, his wife Dharam Devi and his son Shamsher Singh rushed to the scene of the offence. They, however, had not the courage to go to the rescue of the victim, because they were afraid that they would themselves be assaulted. At the time of the assault, Darya Singh fired shots in the air to frighten people. After the assailants left the scene of the offence, Dalip Singh, Dharam Devi and Shamsher Singh went near the victim, but found that he was dead. First Information Report about this occurrence was then sent and that set the investigation into motion, as a result of which the three appellants and their brother Ratti Ram were arrested and put up for trial for offence under section 302/34 Indian Penal Code.

The case of the prosecution rests on the evidence of three eye-witnesses, Dalip Singh (P. W. 2), Shamsher Singh (P. W. 3) who is a student of the Engineering College, Ludhiana, and Dharam Devi (P.W. 4). These three witnesses gave a consistent account of the attack on Inder Singh which they witnessed in front of their house and stated how each one of the three appellants took part in the assault. Hira Singh (P. W. 5) who is Lambardar of the village, reached the scene of the offence, after the victim had been murdered. When he reached the scene of the offence he was told by Shamsher Singh about the assault and was also given the names of the assailants. The learned trial Judge believed the three eye-witnesses, but was not inclined to act upon the evidence of Hira Singh. The High Court has believed the three eye-witnesses as well as the evidence of Hira Singh. The High Court thought that the failure of Dalip Singh to refer to the arrival of Hira Singh in the first information report did not introduce any infirmity in the evidence of Hira Singh himself, and it has observed that Hira Singh's presence on the scene soon after the occurrence is established by the fact that he has signed the inquest report which was prepared by the Assistant Sub-Inspector Gurbux Singh on reaching the scene of the offence at about 9 A.M. In considering the evidence of these witnesses, the High Court took into account the fact that some inconsistencies were brought to its notice, but it held that they did not constitute any serious infirmity in the evidence at all. It is true that the prosecution had also relied upon the evidence of certain recoveries made by the investigating officer, but neither the Sessions Judge nor the High Court has attached any importance to the said recoveries or the disclosure statements preceding them. Since the High Court took the view that the oral evidence adduced by the prosecution established the guilt of the appellants beyond a reasonable doubt, it has confirmed their conviction under section 302/34 and the sentence of life imprisonment imposed on them by the trial Court.

It appears that the murder of Inder Singh was an act of reprisal on the part of the appellants, because it is not denied that Dewan Singh, another brother of

the appellants, had been killed in April, 1957, and Dhup Singh, the step-brother of Inder Singh had been found guilty of the said murder. The sentence of life imprisonment imposed on him by the Trial Court had been confirmed by the High Court on 14th January, 1959, but on the recommendation made by the High Court, the said sentence had been commuted to five years by the State Government. There is evidence to show that Inder Singh moved the State Government of Punjab for the release of Dhup Singh on two months' parole, and this he did by an application on 5th April, 1960. It appears that this application had been subsequently rejected by the State Government on 15th July, 1960; but on 2nd June, 1960, when Inder Singh was assaulted, the said application was pending and the appellants were indignant that Inder Singh should have moved the State Government for the release of his step-brother Dhup Singh. That, according to the prosecution, is the motive for the commission of the offence. Both the Courts below have agreed that this motive must have led to the commission of the offence.

Mr. Bhasin contends that the High Court was in error in accepting the evidence of the three eye-witnesses, because the said evidence has been given by witnesses who are near relatives of Inder Singh and who shared Inder Singh's enmity against the appellants. In such a case, the High Court could not have acted upon the said interested and hostile evidence without corroboration; Mr. Bhasin realised that if he were to contend that the High Court should not have accepted the said evidence on the merits, that would be a matter of appreciation of oral evidence and the conclusion of the High Court based on the appreciation of oral evidence cannot ordinarily be challenged in an appeal under Article 136. He, therefore, put his case higher and contended that in law the evidence of interested and hostile witnesses cannot be accepted without corroboration, and he suggests that some of the decisions of this Court lend support to his argument.

There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal Courts must examine the evidence of the interested witnesses like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the Criminal Courts to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, Courts naturally begin with the enquiry as to whether the said witnesses were chance-witnesses or whether they were really present on the scene of the offence. If the offence has taken place, as in the present case, in front of the house of the victim, the fact that on hearing his shouts, his relations, rushed out of the house cannot be ruled out as being improbable, and so, the presence of the three eye-witnesses cannot be properly characterised as unlikely. If the Criminal Court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised. In doing so, it may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars. We

do not think it would be possible to hold that such witnesses are no better than accomplices and that their evidence, as a matter of law, must receive corroboration before it is accepted. That is not to say that the evidence of such witnesses should be accepted light-heartedly without very close and careful examination; and so, we cannot accept Mr. Bhasin's argument that the High Court committed an error of law in accepting the evidence of the three eye-witnesses without corroboration.

It now remains to consider Mr. Bhasin's contention that some of the decisions of this Court support the proposition that as a matter of law, corroboration must be available before interested evidence of the relatives of the victim can be accepted. The first decision on which Mr. Bhasin has relied is the case of *Rameshwar v. The State of Rajasthan*¹. In that case, the accused was charged with having committed an offence under section 376 Indian Penal Code, and the point which was raised for the decision of this Court was in regard to the appreciation of the evidence of a prosecutrix in a sex offence. In that connection, this Court held that though a woman who has been raped is not an accomplice, her evidence has been treated by the Courts on somewhat similar lines, and the rule which requires corroboration of such evidence save in exceptional circumstances, has now hardened into law. It is obvious that this decision can have no application to the facts in the present case. It is well settled that in cases of rape, prudence requires that evidence given by the prosecutrix should be corroborated, though even in these cases, it would be open to a Court of law to act upon the evidence of the prosecutrix if her evidence appears to the Court to be completely satisfactory and there are attending circumstances which make it safe for the Court to act upon that evidence without corroboration. But cases of rape cannot, in the context, be compared to cases of murder, and so, no assistance can be legitimately drawn by Mr. Bhasin from this decision in contending that in a murder case, if a relative of the victim gives evidence, his evidence cannot, in law, be acted upon unless it is corroborated.

The next decision to which Mr. Bhasin has referred is the decision of this Court in *Lachman Singh and others v. The State*². It appears that in that case, the High Court had taken the view that "in all the circumstances it would be proper not to rely upon the oral evidence implicating particular accused unless there is some circumstantial evidence to support it", and the High Court proceeded to examine the evidence from this point of view, and upheld the conviction of three persons who had come to this Court in appeal under Article 136. The contention of the appellants that their conviction was not justified, however, failed and their appeal was dismissed. Mr. Bhasin suggests that in dealing with the evidence, this Court had impliedly approved of the approach adopted by the High Court in appreciating the evidence of interested testimony in a murder trial. It cannot be disputed that if the evidence given by interested witnesses in a murder trial seems to suffer from some infirmities, the Court would be justified in looking for some corroboration before accepting the said evidence. Cases may arise where such interested evidence may be shown to have implicated some persons without any justification, or cases may arise where the evidence given by eye-witnesses, who are interested, conflicts in material particulars, or may appear to be improbable; in all these cases, the Court would naturally be justified in refusing to act upon such evidence without corroboration. That is a precaution which is invariably adopted by Criminal Courts in dealing with all direct evidence, and so, the fact that in the circumstances of any particular case, the High Court required some corroboration before acting upon direct evidence and this Court approved of the said approach, does not lend support to the general proposition of law for which Mr. Bhasin contends that in all cases where interested witnesses give evidence in a murder trial, their evidence cannot be accepted as a matter of law without corroboration.

In *Karnail Singh and another v. The State of Punjab*³, the High Court from whose decision an appeal was brought to this Court, had adopted a similar approach.

¹ 1. (1952) S.C.J. 46 : (1952) S.G.R. 377 : (1952) S.C.R. 839 at p. 844.

(1952) 1 M.L.J. 440.

3. (1954) S.C.R. 904 : (1954) S.C.J. 269.

2. (1952) S.C.J. 230 : (1952) 2 M.L.J. 100 :

Having regard to the circumstances of the case, the High Court had taken the view that the evidence given by the sole witness Karnail Singh could not be safely acted upon unless there was some corroboration, and in dealing with this approach, this Court took the precaution of repeating what it had already stated in the case of *Lachman Singh and others*¹; that the corroboration that is required in such cases is not what would be necessary to support the evidence of an approver, but what would be sufficient to lend assurance to the evidence before them, and satisfy them that the particular persons were really concerned in the murder of the deceased.

The same view has been expressed by this Court in the case of *Vaikuntam Chandrappa and others v. The State of Andhra Pradesh*². Therefore, the broad and unqualified proposition for which Mr. Bhasin contends is not supported by any of the decisions on which he relied. We have no doubt that the rule of caution which requires corroboration to evidence of interested witnesses cannot be treated as an inflexible principle which can be mechanically applied to all cases, because in that event if a murder is committed in the house of the victim, it would be difficult to convict the assailant, for in such a case all the witnesses would be relatives of the victim. That is why in appreciating evidence of this kind, Courts have, no doubt, to be careful, but they cannot be bound by any inflexible rule like the one suggested by Mr. Bhasin.

Mr. Bhasin further argued that the murder having taken place in a locality where a large number of citizens resided, it was the duty of the prosecution to have examined independent persons staying in the locality to support its case against the appellants and he suggested that if the prosecution failed to examine such witnesses, it was the duty of the Court to have exercised its powers under section 540 of the Criminal Procedure Code and to call such witnesses to give evidence. Mr. Bhasin argues that under section 172 of the Code, it is competent to a Criminal Court to send for the police diaries of a case under trial in such Court, and if the Court had seen the police diaries, it would have easily found whether the statements of any independent eye-witnesses had been recorded or not. If it found that some statements of independent eye-witnesses had been recorded, it should have called them in exercise of its powers under section 540 of the Code; since this has not been done, it has introduced an infirmity in the trial, and this Court should set aside the conviction of the appellants and send the case back with a direction that the Magistrate should exercise his powers under section 540 as suggested by Mr. Bhasin. In our opinion, this argument is entirely misconceived. It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the Court in reaching a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion, have not witnessed the incident, but normally he ought to examine all the eye-witnesses in support of his case. It may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness-box. If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back, the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case, if the ends of justice require, the Court may even examine such witnesses by exercising its powers under section 540; but to say that in every murder case, the Court must scrutinise the police diary and make a list of witnesses whom the prosecutor must examine is virtually to suggest that the Court should itself take the role of a prosecutor. The powers of the Court under section 540 can and ought to be exercised in the interests of justice whenever the Court feels that the

interests of justice require, but that does not justify Mr. Bhasin's contention that the failure of the Court to have exercised its powers under section 540 has introduced a serious infirmity in the trial itself.

In this connection, it is necessary to bear in mind that there is nothing on the record to show that any person in the locality who actually witnessed the incident had been kept back. No such suggestion has been made to the investigating officer and no other evidence has been brought by the defence in support of such a plea. It is well known that in villages where murders are committed as a result of factions existing in the village or in consequence of family feuds, independent villagers are generally reluctant to give evidence because they are afraid that giving evidence might invite the wrath of the assailants and might expose them to very serious risks. It is quite true that it is the duty of a citizen to assist the prosecution by giving evidence and helping the administration of criminal law to bring the offender to book, but it would be wholly unrealistic to suggest that if the prosecution is not able to bring independent witnesses to the Court because they are afraid to give evidence, that itself should be treated as an infirmity in the prosecution case so as to justify the defence contention that the evidence actually adduced should be disbelieved on that ground alone without examining its merits. In the present case, we see no justification for the assumption that any eye-witness has been kept back from the Court and so, we feel no hesitation in rejecting the argument that the case should be sent back on the hypothetical ground that the scrutiny of the police diary may disclose the presence of an independent eye-witness; such an argument is wholly misconceived and can be characterised as fantastic.

As we have already indicated, both the Courts below have examined the evidence given by the eye-witnesses and have believed the said evidence. The High Court has also believed the evidence of Hira Singh, the Lambarar. The story deposed to by these witnesses appears to be very probable and has been treated by the Courts below as consistent and cogent. In such circumstances, it is not open to the appellants to contend that this Court should re-appreciate the said evidence and decide whether the view taken by the High Court is right or not. In our opinion, the conviction of the appellants rests on the appreciation of oral evidence and no case has been made out for our interference under Article 136 of the Constitution.

The result is, the appeal fails and is dismissed.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Union of India

.. *Appellant**

v.

Ram Charan (deceased) through his Legal Representatives .. *Respondent.*

Civil Procedure Code (V of 1908), Order 22, rules 4 and 9 and section 151—Scope of.

The Court is not to invoke its inherent powers under section 151 of the Civil Procedure Code (V of 1908) for the purposes of impleading the legal representatives of a deceased respondent, if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on the record and when its application for setting aside the abatement is not allowed on account of his failure to satisfy the Court that there was sufficient cause for not impleading the legal representatives of the deceased in time and for not applying for the setting aside of the abatement within time.

It is true that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself justify his application for setting aside the abatement. The applicant had to allege and establish facts, which will in the view of the Court, be a sufficient reason for his not making the application for bringing on record the legal representatives of the deceased within time. If no such facts are alleged, none can be established and in that case the Court cannot set aside the abatement of the suit unless the very circumstances of the

case make it so obvious that the Court will be in a position to hold that there was sufficient cause for the applicant's not continuing the suit by taking necessary steps within the period of limitation. If the mere fact that the applicant had known of the death belatedly was sufficient for the Court to set aside the abatement, the Legislature would have expressed itself differently and would not have required the applicant to prove that he was prevented by any sufficient cause from continuing the suit. It would be futile to lay down precisely as to what considerations would constitute "sufficient cause". But it can be said that the delay should not be for reasons which indicate the plaintiff's negligence in not taking certain steps which he could have and should have taken. Courts have to use their discretion in the matter soundly in the interests of justice.

Appeal by Special Leave from the Judgments and Orders dated 16th and 26th February, 1960 of the Punjab High Court in Civil Misc. No. 1212-G of 1959 and Regular First Appeal No. 44 of 1955.

D. R. Prem, Senior Advocate. (*P. D. Menon*, Advocate, with him), for Appellant.

Veda Vyasa, Senior Advocate (*K. K. Jain*, Advocate for *P. C. Khanna*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—The facts leading to this appeal, by Special Leave, against the orders of the High Court of Punjab are these. Ram Charan obtained a decree for money against the Union of India on 6th January, 1955. The Union of India presented an appeal on 6th April 1955, in the High Court. Ram Charan, the sole respondent, filed a cross-objection on 31st July, 1955. On 6th February, 1956 the High Court passed an order in connection with the surety bond. Ram Charan was represented at the proceedings. Ram Charan died on 21st July, 1957.

On 18th March, 1958, an application was presented to the High Court on behalf of the appellant under Order 22, rule 4, read with section 151 Code of Civil Procedure, stating that Ram Charan died on 21st July, 1957, that the Divisional Engineer, Telegraphs, Ambala Cantonment, learnt of his death on 3rd February, 1958, and that the deceased had left as his legal representatives, an adopted son and a widow. It was prayed that these legal representatives be brought on record in the place of the deceased respondent. The affidavit filed in support of this application did not convey any further information and it was solemnly affirmed by the deponent that the averments in the affidavit were true to his belief. The deponent was no other than the Divisional Engineer, Telegraphs, Ambala Cantonment.

On 13th May, 1958, the widow of Ram Charan applied that she alone was the legal representative of Ram Charan under a will and that the alleged adopted son was not the legal representative. The appellant's application for bringing on record the legal representatives of the deceased Ram Charan came up for hearing on 14th May, 1958. The Court ordered the application to be heard at the time of the hearing of the appeal as it was pointed out that there was a difference of opinion in the Court as to whether limitation under Order 22 of the Code started from the date of death or from the date of knowledge of death. Subsequently, on an application on behalf of the legal representatives, it was ordered that the question of abatement be decided first and thereafter the printing of the record be taken on hand. The application for substitution came up for decision on 16th February, 1960. It was dismissed, the Court holding that the Union of India had failed to show that it was prevented from any sufficient cause from continuing the appeal. On 26th February, 1960, the appeal itself was dismissed as having abated.

On 14th May, 1960, an application for leave to appeal to the Supreme Court was presented to the High Court. The heading of the application was described to be one for leave to appeal to the Supreme Court from the judgment dated 16th February, 1960, in C.M. No. 1212/G of 1959 in R.F.A. No. 44 of 1955. This application was rejected on 17th May, 1960. Thereafter, an application for Special Leave was filed in this Court. Special Leave was prayed for appealing from the judgment of the High Court of Punjab in R.F.A. No. 44 of 1955 and C.M. No. 1212/G of 1959 dated 16th and 26th February, 1960. The order granting Special Leave said :

"That Special Leave be and is hereby granted to the petitioner to appeal to this Court from the judgment and order dated 16th day of February, 1960 and 26th day of February, 1960 of the Punjab High Court in Civil Miscellaneous No. 1212-G of 1959 and Regular First Appeal No. 44 of 1955."

A preliminary objection was taken to the effect that the appellant having not applied to the High Court for leave to appeal against the order dated 26th February, 1960, in Regular First Appeal, that order had become final and Special Leave could not be asked for from this Court in view of Order 13, rule 2 of the Supreme Court Rules, 1950, the rule being :

"Where an appeal lies to the Supreme Court on a certificate issued by the High Court or other tribunal, no application to the Supreme Court for Special Leave to appeal shall be entertained unless the High Court or tribunal concerned has first been moved and it has refused to grant the certificate."

We do not see any force in this objection and reject it. The application for leave to appeal, though described as one against the judgment in the miscellaneous case and not against the order in the regular appeal, stated in paragraph 1 that the regular First Appeal had been ordered to have abated and in paragraph 3 that it was a fit case in which necessary certificate for filing an appeal against the judgment passed by the Court in Regular First Appeal No. 44 of 1955 be granted. Both these statements refer to the proceedings in connection with the regular first appeal and not of the order on the miscellaneous application for substitution. Ground No. 2 referred to those proceedings. The application, therefore, was really an application for leave to appeal against both the orders.

The High Court does appear to have construed that application in this manner. Its order dated 17th May, 1960, stated :

"The appeal was decided as having abated because the appellant failed to show sufficient cause for not bringing the legal representatives of the deceased respondent within time."

To appreciate the real contention between the parties before us, we may now give in brief, the reasons for the order of the High Court dated 16th February, 1960. It may be pointed out that in the narration of facts the High Court stated that the application dated 17th March, 1958, was filed under Order 22, rules 4 and 9 read with section 151 of the Code. The application, as printed on the record, did not purport to be under rule 9 of Order 22, Civil Procedure Code. There is not a word in the application that the appeal had abated and that the abatement be set aside. The error in this respect seemed to have further led to the error in stating that the reason for the delay given in the application was that the Divisional Engineer, Telegraphs, came to know about Ram Charan's death on 3rd February, 1958, there being no reason mentioned in the application. It was just stated as a matter of fact that the Engineer had come to know of the death on 3rd February, 1958. The order states that some application was presented by the Union of India on 14th May, and that it was stated therein that the interval between 3rd February, and 17th March, 1958, was spent in collecting information about the legal representatives of the deceased. This application, however, is not printed in the paper book.

The High Court relied on the Full Bench case of its Court reported in *Firm Dittu Ram Eyedan v. Om Press Co., Ltd.*¹, which held that ignorance of the death of the defendant was not a sufficient cause for setting aside the abatement when an application to bring the legal representatives of the deceased on the record was made after the expiry of the period of limitation, as the law imposed an obligation on the person applying for bringing the legal representatives of the deceased on the record and he had, therefore, to show absence of want of care. The High Court held that the Union of India did not state either in its application dated 17th March, 1958 or in the other application dated 14th May, 1958, that the Government had not been careless in the matter and had been vigilant in keeping itself informed regarding the whereabouts of Ram Charan and that it would not have been difficult for the Government to have come to know of Ram Charan's death who lived in Ambala Cantonment, to which place the appeal related.

The contentions raised for the appellant in this Court are :

(1) That mere ignorance of death of the respondent was sufficient cause for the appellant's inability to apply for the impleading of the legal representatives within time, unless it be that the appellant was guilty of some negligence or some act or omission which led to the delay in his making the application.

(2) Once the respondent is served in the first appeal, no duty is cast on the appellant to make regular enquiries about the state of health of the respondent.

(3) The expression 'sufficient cause' should be liberally construed in order to advance the cause of justice.

(4) The Court itself has inherent power to add legal representatives to do full justice to the party.

(5) The High Court misapplied the decision of the Full Bench of its Court to the facts of the present case.

We may say at once that there is no force in the fourth point. The Court is not to invoke its inherent powers under section 151, Civil Procedure Code, for the purposes of impleading the legal representatives of a deceased respondent ; if the suit had abated on account of the appellant not taking appropriate steps within time to bring the legal representatives of the deceased party on the record and when its application for setting aside the abatement is not allowed on account of its failure to satisfy the Court that there was sufficient cause for not implading the legal representatives of the deceased in time and for not applying for the setting aside of the abatement within time.

There is no question of construing the expression "sufficient cause" liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his right of proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement.

It is true, as contended, that it is no duty of the appellant to make regular enquiries from time to time about the health or existence of the opposite party, but it does not mean that the mere fact of the appellant's coming to know of the respondent's death belatedly will, by itself, justify his application for setting aside the abatement. That is not the law. Rule 9 of Order 22 of the Code requires the plaintiff to prove that he was prevented by any sufficient cause from continuing the suit. The mere allegation about his not coming to know of the death of the opposite party is not sufficient. He had to state reasons which, according to him led to his not knowing of the death of the defendant within reasonable time and to establish those reasons to the satisfaction of the Court, specially when the correctness of those reasons is challenged by the legal representatives of the deceased who have secured a valuable right on the abatement of the suit.

It is not necessary to consider whether the High Court applied its earlier Full Bench decision correctly or not when we are to decide the main question urged in this appeal and that being the first contention. Rules 3 and 4 of Order 22, Civil Procedure Code, lay down respectively the procedure to be followed in case

of death of one of several plaintiffs when the right to sue does not survive to the surviving plaintiffs alone or that of the sole plaintiff when the right to sue survives or of the death of one of several defendants or of sole defendant in similar circumstances. The procedure requires an application for the making of the legal representatives of the deceased plaintiff or defendant a party to the suit. It does not say who is to present the application. Ordinarily it would be the plaintiff as by the abatement of the suit the defendant stands to gain. However, an application is necessary to be made for the purpose. If no such application is made within the time allowed by law, the suit abates so far as the deceased plaintiff is concerned or as against the deceased defendant. The effect of such an abatement on the suit of the surviving plaintiffs or the suit against the surviving defendants depends on other considerations as held by this Court in *State of Punjab v. Nathu Ram*¹ and *Jhanda Singh v. Gurmukh Singh*². Any way, that question does not arise in this case as the sole respondent had died.

It may be mentioned that in view of rule 11 of Order 22, the words 'plaintiff' 'defendant' and 'suit' in that Order include 'appellant', 'respondent' and 'appeal' respectively.

The consequence of the abatement of the suit against the defendant is that no fresh suit can be brought on the same cause of action. Sub-rule (1) of rule 9 bars a fresh suit. The only remedy open to the plaintiff or the person claiming to be the legal representative of the deceased plaintiff is to get the abatement of the suit set aside and this he can do by making an application for that purpose within time. The Court will set aside the abatement if it is proved that the applicant was prevented by any sufficient cause from continuing the suit. This means that the applicant had to allege and establish facts which would, in the view of the Court, be a sufficient reason for his not making the application for bringing on record the legal representatives of the deceased within time. If no such facts are alleged, none can be established and, in that case the Court cannot set aside the abatement of the suit unless the very circumstances of the case make it so obvious that the Court would be in a position to hold that there was sufficient cause for the applicant's not continuing the suit by taking necessary steps within the period of limitation. Such would be a very rare case. This means that the bare statement of the applicant that he came to know of the death of the other party more than three months after the death will not ordinarily be sufficient for the Court's holding that the applicant had sufficient cause for not impleading the legal representatives within time. If the mere fact that the applicant had known of the death belatedly was sufficient for the Court to set aside the abatement, the Legislature would have expressed itself differently and would not have required the applicant to prove that he was prevented by any sufficient cause from continuing the suit. The period of limitation prescribed for making such an application is three months, under Article 171 of the First Schedule to the Limitation Act. This is a sufficiently long period and appears to have been fixed by the legislature on the expectancy that ordinarily the plaintiff would be able to learn of the death of the defendant and of the persons who are his legal representatives within that period. The Legislature might have expected that ordinarily the interval between two successive hearings of a suit will be much within three months and the absence of any defendant within that period at a certain hearing may be accounted by his counsel or some relation to be due to his death or may make the plaintiff inquisitive about the reasons for the other party's absence. The Legislature further seems to have taken into account that there may be cases where the plaintiff may not know of the death of the defendant as ordinarily expected and, therefore, not only provided a further period of two months under Article 176 for an application to set aside the abatement of the suit, but also made the provisions of section 5 of the Limitation Act applicable to such applications. Thus the plaintiff is allowed sufficient time to make an application to set aside the abatement which, if exceeding five

1. (1961) 2 S.C.J. 637 : (1961) 2 M.L.J. (S.C.) 182 : (1961) 2 An.W.R. (S.C.) 182 : (1962) 2 S.C.R. 636 : A.I.R. 1962 S.C. 89.

2. C.A. No. 344 of 1956 decided on 10th April, 1962.

months, be considered justified by the Court in the proved circumstances of the case. It would be futile to lay down precisely as to what considerations would constitute 'sufficient cause' for setting aside the abatement or for the plaintiffs not applying to bring the legal representatives of the deceased defendant on the record or would be held to be sufficient cause for not making an application to set aside the abatement within the time prescribed. But it can be said that the delay in the making of such applications should not be for reasons which indicate the plaintiff's negligence in not taking certain steps which he could have and should have taken. What would be such necessary steps would again depend on the circumstances of a particular case and each case will have to be decided by the Court on the facts and circumstances of the case. Any statement of illustrative circumstances or facts can tend to be a curb on the free exercise of its mind by the Court in determining whether the facts and circumstances of a particular case amount to 'sufficient cause' or not. Courts have to use their discretion in the matter soundly in the interests of justice.

It will serve no useful purpose to refer to the cases relied on for the appellant in support of its contention that the appellant's ignorance of the death of the respondent is sufficient cause for allowing its application for the setting aside of the abatement and that in any case it would be sufficient cause if its ignorance had not been due to its culpable negligence or *mala fides*. We have shown above that the mere statement that the appellant was ignorant of the death of the respondent, cannot be sufficient and that it is for the appellant, in the first instance, to allege why he did not know of the death of the respondent earlier or why he could not know about it despite his efforts, if he had made any efforts on having some cause to apprehend that the respondent might have died. The correctness of his reasons can be challenged by the other party. The Court will then decide how far those reasons have been established and suffice to hold that the appellant had sufficient cause for not making an application to bring the legal representatives of the deceased respondent earlier on the record.

In the present case the, appellant had adopted a very wrong attitude from the very beginning. In its application dated 17th March, it merely said that Ram Charan died on 21st July, 1957, and that Shri Bhatia, the Divisional Engineer, Telegraphs, Ambala Cantonment, learnt about it on 3rd February, 1958. Shri Bhatia did not say anything more in this affidavit and did not verify it on the basis of his personal knowledge. Why he did not do so is difficult to imagine if he came to know of the death on 3rd February, 1958. He was the best person to say that this statement was true to his knowledge, rather than true to his belief. Further, it appears from the judgment of the High Court that no further information was conveyed in the application dated 13th May, 1958 which is not on the record. The most damaging thing for the appellant is that the application came up for hearing before the learned Single Judge and at that time the stand taken by it was that limitation for such an application starts not from the date of death of the respondent but from the date of the appellant's knowledge, of the death of the respondent. The appellant's case seems to have been that no abatement had actually taken place as the limitation started from 3rd February, 1958, when the appellant's officer knew of the death of the respondent and the application was made within 3 months of that date. It appears to be due to such an attitude of the appellant that the application dated 17th March, 1958, purported to be simply under rule 4 of Order 22 and did not purport to be under rule 9 of the said Order as well and that no specific prayer was made for setting aside the abatement. The limitation for an application to set aside abatement of a suit does start on the death of the deceased respondent. Article 171, First Schedule to the Limitation Act provides that. It does not provide the limitation to start from the date of the appellant's knowledge thereof. The stand taken by the appellant was absolutely unjustified and betrayed complete lack of knowledge of the simple provision of the Limitation Act. In these circumstances, the High Court cannot be said to have taken an erroneous view about the appellant's not establishing sufficient ground for not making an application to bring on record the

representatives of the deceased respondent within time or for not making an application to set aside the abatement within time. We, therefore, see no force in this appeal and dismiss it with costs.

K.L.B.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.
Shri Jagannatham and brothers

*Appellant**

v.

M/s. Sowdambigai Motors Service Dharmapuram and others

Respondents.

Motor Vehicles Act (IV of 1939)—Regional Transport Authority granting permits to ply buses on routes in a town to existing operator in preference to new entrant—State Transport Appellate Tribunal allowing appeal by new entrant without considering why that applicant should be preferred to the existing operator to whom permit had been granted—Sustainability of order.

The Regional Transport Authority after considering applications for permits to ply buses on routes in a town granted a permit to X, an existing operator. On appeal by Y a new entrant, for a new route in the town, the State Transport Appellate Authority held that Y should be preferred to X. On a writ petition by X a Single Judge of the High Court set aside the order on the ground that the Tribunal did not state why Y should be preferred to X. A Letters Patent Appeal against the decision was dismissed *in limine*. On appeal by Special Leave to the Supreme Court,

Held : Though the Tribunal has set out the qualifications of Y it has not considered whether X does or does not possess similar qualifications. In the circumstances there has been no proper determination of the only question which requires to be determined and that is, why one operator should be preferred to the other and the order was rightly set aside.

Appeal by Special Leave from the Judgment and Order dated 23d October, 1962 of the Madras High Court in Writ Appeal No. 207 of 1962.

B. Sen, Senior Advocate, (J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant.

A. V. Viswanatha Sastri, Senior Advocate (R. Ganapathy Iyer, Advocate, with him), for Respondent No. 1.

A. V. V. Nair and P. Ram Reddy, Advocates, for Respondent No. 2.

The Judgment of the Court was delivered by

Mudholkar, J.—A Single Judge of the Madras High Court set aside the order of the State Transport Appellate Tribunal, Madras, allowing the appellant company's appeal granting them a permit to ply a bus on route No. 5 in Erode Town. An appeal preferred against his decision by the appellant-company under clause 15 of the Letters Patent was dismissed *in limine*. Against that decision the appellant has come up before this Court by Special Leave. The Regional Transport Authority, Coimbatore, invited applications for the grant of six permits for stage carriage buses for running Erode Town service. On route No. 5 two stage carriage buses were sought to be introduced. The appellant, as well as respondents 1 and 2 and some others, had applied for the grant of all the six permits, including two on route No. 5. The Regional Transport Authority at its meeting held on 16th March, 1961 considered the applications, granted four permits out of six to four existing operators and on route No. 5, which was a new route, it granted a permit to each of the two respondents. Aggrieved by this order the appellant preferred an appeal before the State Transport Appellate Tribunal which held that the appellant should be preferred to the respondent No. 1. The Tribunal thus did not interfere with the order of the Regional Transport Authority in so far as the permit granted to the respondent No. 2 was concerned but set aside its order granting a permit to the respondent No. 1. Against this order the respondent No. 1 preferred a writ petition before the High Court. That petition was heard by a single Judge of the High Court and, as already stated, the learned Judge set aside the order of the Tribunal in so far as the appellant was concerned. The ground on which the learned Judge set aside the order of the Tribunal was that the Tribunal did not state why the appel-

lant should be preferred to the respondent No. 1 in the matter of being given a permit. The learned Judges who heard the Letters Patent Appeal preferred by the appellant observed, while dismissing the appeal :

"The first respondent had this advantage, viz., that he was given the permit by the Regional Transport Authority. Before that permit could be set aside it was the duty of the Appellate Tribunal to have considered the superior merit of the appellant. In considering such superior merit, it was bound to consider the pros and cons of the experience alleged to be possessed by the first respondent as against the claim of the appellant who puts his case only as a new entrant. The Tribunal appears to have taken as a rule of law that new entrants should invariably be preferred as that would give them an enthusiasm and also surcharge the atmosphere with a healthy competition. But it forgot that in all these matters, the paramount question, to be considered was the interest of the public, and, in considering the question, it had a duty to evaluate the rival claims of the two operators."

Thus both the learned Single Judge and the Appeal Court interfered with the order of the Tribunal on the ground that it had failed to determine a material issue and had thus not performed its duty.

It is an admitted fact that though the appellant has experience of running buses on certain routes in the State it has no recent experience of running buses in a town. The appellant could, therefore, be properly regarded as a new entrant in so far as town service is concerned. This fact has never been in dispute. The Regional Transport Authority considered this circumstance against the appellant while granting permits to the respondents 1 and 2. The Tribunal, however, advertent to Government Order No. 2265 dated 9th August, 1958 and certain observations of this Court in *Raman and Raman Ltd. v. The State of Madras*¹ came to the conclusion that new entrants ought to be preferred in the matter of granting permits even on town routes. The Regional Transport Authority on the other hand felt that bearing in mind the fact that there is considerable traffic in towns and the roads are narrow, it is desirable to prefer existing operators to a new one. The Regional Transport Authority also appears to have had in mind a circular dated 14th October, 1960 issued by the Transport Commissioner in coming to this conclusion. In that circular the Transport Commissioner appears to have placed his interpretation on the Government Order already referred to in which routes have been placed in three categories: "short routes", "medium routes" and "long routes". In that circular the Transport Commissioner has observed :

".....the Government are of opinion that the town service routes should be excluded from the scope of short routes and they should be treated as a separate category".

Apparently, this is nothing more than the opinion of the Transport Commissioner and not a Government Order which requires to be given effect to wherever possible by the Regional Transport Authority. Thus one of the reasons given by the Regional Transport Authority may not be correct. However, we wish to make no pronouncement one way or the other on this question because in our view the Tribunal has not addressed itself specifically to the question as to why the appellant should be preferred to respondent No. 1. No doubt, the Tribunal has set out the qualifications possessed by the appellant. But it has not considered whether the respondent No. 1 does or does not possess similar qualifications. In the circumstances we agree High Court that there has been no proper determination of the only question which requires to be determined and that is why one operator should be preferred to another.

Mr. B. Sen who appears for the appellant contended that the learned Single Judge ought to have remanded the matter to the Tribunal after setting aside its order and that it could not confirm the order of the Regional Transport Authority at any rate without going into the merits of the rival claims. It is true that the order of the learned Judge is not very clearly worded. But it seems to us that what he really meant was that the appeal should be re-heard by the Tribunal and decided in the light of his observations. This we think should be sufficient to remove such grievance as the appellants may have. The appeal is dismissed but there will be no order as to costs in this Court.

K.S.

Appeal dismissed.

1. (1959) S.C.J. 1156 : (1959) 2 M.L.J. (S.C.) L.J. (Crl) 844 : A.I.R. 1959 S.C. 694 at 702.
36 : (1959) 2 An.W.R. (S.C.) 236 : (1959) M.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J.C. SHAH AND S. M. SIKRI, JJ.

The Commissioner of Income-tax, Kerala and Coimbatore

.. Appellant *

v.

L. W. Russel

.. Respondent.

Income-tax Act, (XI of 1922), section 7 (1) Explanation I, Clause (v)—Perquisite—Assessee, an employee—Superannuation scheme by employer—Insurance for an annuity—Contribution by employer towards share of premium in a year—Employee entitled to amounts only on attaining age of superannuation or another contingency—Employer's contribution for the year—Not a sum 'paid', 'due' or 'allowed'—Not taxable as perquisite.

The assessee was an employee of a Society which had established a superannuation scheme for the benefit of its employees, by means of deferred annuities, the terms of which were incorporated in a trust deed. Every employee had to become a member of the scheme as a condition of the employment. The trustee has to effect a scheme of insurance for the purpose of ensuring an annuity for every member-employee on his attaining the age of superannuation or on the happening of a specified contingency. During the year 1956-57, the Society paid a sum of Rs. 3,333 being its one-third contribution towards the premium payable to the scheme in respect of the assessee. This amount was held taxable as a perquisite under section 7 (1), *Explanation I*, clause (v) of the Income-tax Act by the Department and the Tribunal. The High Court on a Reference under section 66 (1) held that the sum was not taxable. The Department appealed to the Supreme Court.

Held : The amount was not taxable under section 7 (1), *Explanation I*, clause (v). Section 7 (1) and *Explanation I*, clause (v) make it clear that if a sum of money is allowed by the employer to the employee or is due to him from or is paid to enable the employee to effect an insurance on his life, the said sum would be a perquisite within the meaning of the section and therefore would be exigible to tax.

But before such sum becomes so exigible, it shall either be paid to the employee, or allowed to him by or due to him from the employer.

The expression 'paid' takes in every receipt by the employee from the employer whether it was due to him or not.

The expression 'due' followed by the qualifying clause 'whether paid or not' shows that there shall be an obligation on the part of the employer to pay that amount and a right on the employee to claim the same.

The word 'allowed' in the legal terminology is equivalent to 'fixed, taken into account, set apart granted'. It takes in perquisites given in cash or in kind or in money or money's worth and also amenities which are not convertible into money. It implies that a right is conferred on the employee in respect of those perquisites. One cannot be said to allow a perquisite to an employee if the employee has no right to the same. It cannot apply to contingent payments to which the employee has no right till the contingency occurs. The employee must have a vested right.

The amounts paid by the Society to the trustees to be administered by them in accordance with the rules framed under the scheme are not perquisites allowed to the assessee-employee or due to him. Till he reaches the age of superannuation, the amounts vest in the trustees and the beneficiary under the trust can be ascertained only on the happening of one or other of the contingencies provided for under the trust deed. No interest in the sum contributed by the employer vested in the employee.

Appeal by Special Leave from the Judgment and Order dated 9th January, 1961 of the Kerala High Court in I.T.Ref. Case No. 17 of 1959.

K. N. Rajagopal Sastri, Senior Advocate (R. N. Sachthcy, Advocate, with him), for Appellant.

Respondent *ex parte*.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave preferred against the judgment of the High Court of Kerala at Ernakulam raises the question of the interpretation of section 7 (1) of the Indian Income-tax Act, XI of 1922, hereinafter called the Act.

The respondent, L.W. Russel, is an employee of the English and Scottish Joint Co-operative Wholesale Society, Ltd., Kozhikode, hereinafter called the Society, which was incorporated in England. The Society established a superannuation

scheme for the benefit of the male European members of the Society's staff employed in India, Ceylon and Africa by means of deferred annuities. The terms of such benefits were incorporated in a trust deed dated 27th July, 1934. Every European employee of the Society shall become a member of that scheme as a condition of employment. Under the terms of the scheme the trustee has to effect a policy of insurance for the purpose of ensuring an annuity to every member of the Society on his attaining the age of superannuation or on the happening of a specified contingency. The Society contributes 1/3 of the premium payable by such employee. During the year 1956-57 the Society contributed Rs. 3,333 towards the premium payable by the respondent. The Income-tax Officer, Kozhikode Circle, included the said amount in the taxable income of the respondent for the year 1956-57 under section 7 (1), *Explanation I*, sub-clause (v) of the Act. The appeal preferred by the respondent against the said inclusion to the Appellate Assistant Commissioner of Income-tax, Kozhikode, was dismissed. The further appeal preferred to the Income-tax Appellate Tribunal received the same fate. The assessee thereupon filed an application under section 66 (1) of the Act to the Income-tax Appellate Tribunal for stating a case to the High Court. By its order dated 1st December 1958, the Tribunal submitted a statement of case referring the following three questions of law to the High Court of Kerala at Ernakulam :

(1) Whether the contributions paid by the employer to the assessee under the terms of a trust deed in respect of a contract for a deferred annuity on the life of the assessee is a 'perquisite' as contemplated by section 7 (1) of the Indian Income-tax Act ?

(2) Whether the said contributions were allowed to or due to the applicant by or from the employer in the accounting year ?

(3) Whether the deferred annuity aforesaid is an annuity hit by section 7 (1) and paragraph (v) of *Explanation I* thereto ?

On the first question the High Court held that the employer's contribution under the terms of the trust deed was not a perquisite as contemplated by section 7 (1) of the Act. On the second question it came to the conclusion that the employer's contributions were not allowed to or due to the employee in the accounting year. On the third question it expressed the opinion that the Legislature not having used the word "deferred" with annuity in section 7 (1) and the statute being a taxing one, the deferred annuity would not be hit by paragraph (v) of *Explanation I* to section 7 (1) of the Act. The Commissioner of Income-tax has preferred the present appeal to this Court questioning the correctness of the said answers.

The three questions formulated for the High Court's opinion are inter-dependent and the answers to them turn upon the true interpretation of the relevant part of section 7 (1) of the Act.

Mr. Rajagopal Sastri, learned Counsel for the appellant, contends that the amount contributed by the Society under the scheme towards the insurance premium payable by the trustees for arranging a deferred annuity on the respondent's superannuation is a perquisite within the meaning of section 7 (1) of the Act and that the fact that the respondent may not have the benefit of the contributions on the happening of certain contingencies will not make the said contributions anyhow a perquisite. The employer's share of the contributions to the fund earmarked for paying premiums of the insurance policy, the argument proceeds, vests in the respondent as soon as it is paid to the trustee and the happening of a contingency only operates as a defeasance of the vested right. The respondent is *ex parte* and, therefore, the Court has not the benefit of the exposition of the contrary view.

Before we attempt to construe the scope of section 7 (1) of the Act it will be convenient at the outset to notice the provisions of the scheme, for the scope of the respondent's right in the amounts representing the employer's contributions thereunder depends upon it. The trust deed and the rules dated 27th July 1934, embody the superannuation scheme. The scheme is described as the English and Scottish Joint Co-operative Wholesale Society, Limited Overseas European Employees' Superannuation Scheme, hereinafter called the Scheme. It is established for the benefit of the male European members of the Society's staff employed in India,

Ceylon and Africa by means of deferred annuities. The Society itself is appointed thereunder as the first trustee. The trustees shall act as agents for and on behalf of the Society and the members respectively; they shall effect or cause to be effected such policy or policies as may be necessary to carry out the scheme and shall collect and arrange for the payment of the moneys payable under such policy or policies and shall hold such moneys as trustees for and on behalf of the person or persons entitled thereto under the rules of the scheme. The object of the Scheme is to provide for pensions by means of deferred annuities for the members upon retirement from employment on attaining certain age under the conditions mentioned therein, namely, every European employee of the Society shall be required as a condition of employment to apply to become a member of the Scheme from the date of his engagement by the Society and no member shall be entitled to relinquish his membership except on the termination of his employment with the Society; the pension payable to a member shall be provided by means of a policy securing a deferred annuity upon the life of such member to be effected by the Trustees as agents for and on behalf of the Society and the members respectively with the Co-operative Insurance Society, Limited securing the payment to the Trustees of an annuity equivalent to the pension to which such member shall be entitled under the Scheme and the Rules; the insurers shall agree that the Trustees shall be entitled to surrender such deferred annuity and that, on such deferred annuity being so surrendered, the insurers will pay to the Trustees the total amount of the premiums paid in respect thereof together with compound interest thereon; all moneys received by the Trustees from the insurers shall be held by them as Trustees for and on behalf of the person or persons entitled thereto under the Rules of the Scheme; any policy or policies issued by the insurers in connection with the Scheme shall be deposited with the Trustees; the Society shall contribute one-third of the premium from time to time payable in respect of the policy securing the deferred annuity in respect of each member as therein-before provided and the member shall contribute the remaining two-thirds; the age at which a member shall normally retire from the service of the Society shall be the age of 55 years and on retirement at such age a member shall be entitled to receive a pension of the amount specified in rule 6; a member may also, after following the prescribed procedure, commute the pension to which he is entitled for a payment in cash in accordance with the fourth column of the Table in the Appendix annexed to the Rules; if a member shall leave or be dismissed from the service of the Society for any reason whatsoever or shall die while in the service of the Society there shall be paid to him or his legal personal representatives the total amount of the portions of the premiums paid by such member and if he shall die whilst in the service of the Society there shall be paid to him or his legal personal representatives the total amount of the portions of the premiums paid by such member and if he shall die whilst in the service of the Society or shall leave or be dismissed from the service of the Society on account of permanent breakdown in health (as to the *bona fides* of which the Trustees shall be satisfied) such further proportion (if any) of the total amount of the portions of premiums paid by the Society in respect of that member shall be payable in accordance with Table C in the Appendix to the Rules; if the total amounts of the portion of the premiums in respect of such member paid by the Society together with interest thereon as aforesaid shall not be paid by the Trustees to him or his legal personal representatives under sub-section (1) of rule 15 then such proportion or the whole, as the case may be, of the Society's portion of such premiums and interest thereon as aforesaid as shall not be paid by the Trustees to such member or his legal personal representatives as aforesaid shall be paid by the Trustees to the Society; the rules may be altered, amended or rescinded and new rules may be made in accordance with the provisions of the Trust Deed but not otherwise.

We have given the relevant part of the Scheme and the Rules. The gist of the Scheme may be stated thus: The object of the Scheme is to provide for pensions to its employees. It is achieved by creating a trustee. The Trustees appointed thereunder are the agents of the employer as well as of the employees and hold the moneys received from the employer, the employee and the insurer in trust for and on behalf of the person or persons entitled thereto under the rules of the Scheme. The Trustees

are enjoined to take out policies of insurance securing a deferred annuity upon the life of each member, and funds are provided by contributions from the employer as well as from the employees. The Trustees realise the annuities and pay the pensions to the employees. Under certain contingencies mentioned above, an employee would be entitled to the pension only after superannuation. If the employee leaves the service of the Society or is dismissed from service or dies in the service of the Society, he will be entitled only to get back the total amount of the portion of the premium paid by him, though the trustees in their discretion under certain circumstances may give him a proportion of the premiums paid by the Society. The entire amount representing the contributions made by the Society or part thereof, as the case may be, will then have to be paid by the Trustees to the Society. Under the scheme the employee has not acquired any vested right in the contributions made by the Society. Such a right vests in him only when he attains the age of superannuation. Till that date that amount vests in the Trustees to be administered in accordance with the rules; that is to say, in case the employee ceases to be a member of the Society by death or otherwise, the amounts contributed by the employer with interest thereon, subject to the discretionary power exercisable by the trustees, become payable to the Society. If he reaches the age of superannuation, the said contributions irrevocably become fixed as part of the funds yielding the pension. To put it in other words, till a member attains the age of superannuation the employer's share of the contributions towards, the premiums does not vest in the employee. At best he has a contingent right therein. In one contingency the said amount becomes payable to the employer and in another contingency, to the employee.

Now let us look at the provisions of section 7 (1) of the Act in order to ascertain whether such a contingent right is hit by the said provisions. The material part of the section reads:

"Section 7 (1) The tax shall be payable by an assessee under the head "salaries" in respect of any salary or wages, any annuity, pension or gratuity, and any fees, commissions, perquisites or profits in lieu of, or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of, of company.

Explanation I.—For the purpose of this section perquisite "includes—

(v) any sum payable by the employer, whether directly or through a fund to which the provisions of Chapters IX-A and IX-B do not apply, to effect an assurance on the life of the assessee or in respect of a contract of annuity on the life of the assessee.

This section imposes a tax on the remuneration of an employee. It presupposes the existence of the relationship of employer and employee. The present case is sought to be brought under the head "perquisites in lieu of, or in addition to, any salary or wages, which are allowed to him by or are due to him, whether paid or not, from, or are paid by or on behalf of a company." The expression "perquisites" is defined in the Oxford Dictionary as "casual emolument, fee or profit attached to an office or position in addition to salary or wages". *Explanation I* to section 7 (1) of the Act gives an inclusive definition. Clause (v) thereof includes within the meaning of "perquisites" any sum payable by the employer, whether directly or through a fund to which the provisions of Chapters IX-A and IX-B do not apply, to effect an assurance on the life of the assessee or in respect of a contract for an annuity on the life of the assessee. A combined reading of the substantive part of section 7 (1) and clause (v) of *Explanation I* thereto makes it clear that if a sum of money is allowed by the employer by or is due to him, from or is paid to enable the latter to effect an insurance on his life, the said sum would be a perquisite within the meaning of section 7 (1) of the Act and, therefore, would be exigible to tax. But before such sum becomes so exigible, it shall either be paid to the employee or allowed to him by or due to him from the employer. So far as the expression "paid is concerned, there is no difficulty, for it takes in every receipt by the employee from the employer whether it was due to him or not. The expression "due" followed by the qualifying clause "whether paid or not" shows that there shall be an obligation on the part of the employer to pay that amount and a right on the employee to claim the same. The

expression "allowed", it is said is of a wider connotation and any credit made in the employer's account is covered thereby. The word "allowed" was introduced in the section by the Finance Act of 1955. The said expression in the legal terminology is equivalent to "fixed, taken into account, set apart, granted". It takes in perquisites given in cash or in kind or in money or money's worth and also amenities which are not convertible into money. It implies that a right is conferred on the employee in respect of those perquisites. One cannot be said to allow a perquisite to an employee if the employee has no right to the same. It cannot apply to contingent payments to which the employee has no right till the contingency occurs. In short, the employee must have a vested right therein.

If that be the interpretation of section 7 (1) of the Act it is not possible to hold that the amounts paid by the Society to the Trustees to be administered by them in accordance with the rules framed under the Scheme are perquisites allowed to the respondent or due to him. Till he reaches the age of superannuation, the amounts vest in the Trustees and the beneficiary under the trust can be ascertained only on the happening of one or other of the contingencies provided for under the trust deed. On the happening of one contingency, the employer becomes the beneficiary, and on the happening of another contingency, the employee becomes the beneficiary. Learned Counsel for the appellant strongly relied upon the decision of the King's Bench Division in *Smyth v. Stretton*¹. There, one Stretton, one of the Assistant Masters of Dulwich College, was assessed to income-tax in the sum of £385 in respect of his emoluments as Assistant Master received from the Governors of Dulwich College for the year ended the 5th day of April, 1901. He objected to the assessment on the ground that it included £35 not liable to taxation, being the amount placed to his credit by the Governors under the Provident Fund Scheme for the year 1900. Channell, J., with some hesitation, came to the conclusion that the said sum was taxable. That case was dealing with a Scheme for the establishment of provident fund for the benefit of the Assistant Masters on the permanent staff of the Dulwich College. Under paragraph 1 of the scheme the salaries of the Assistant Masters were increased. Clause (a) of para. 1 of the Scheme provided that Assistant Masters having, not less five years, but less than fifteen years' service, would be allowed an increase of 5 per cent. in their salaries; under clause (b) thereof, Assistant Masters having not less than 15 years' of service and over, would get an increase of 7½ per cent. in their salaries; under clause (c) thereof, a further addition in their salaries, equal in amount to the above sums, should be granted from the same date to the Assistant Masters alluded to in (a) and (b), such addition being, however, subject to the conditions provided by para. 5. Paragraph 5 read :

"That Assistant Masters having less than ten years' service who may resign their appointments, or from any other cause than ill-health cease to belong to the College, shall be entitled to receive the total increase sanctioned by (a) and the accumulations thereof, but shall not receive the additional increase sanctioned by (c), or the accumulations thereof. In the event of any such Assistant Master retiring from ill-health the Governors, in addition to the increase sanctioned by (a), may grant him the further 5 per cent. sanctioned by (c), and the accumulations thereof. In the event of death of any such Assistant Master whilst in the service of the college, the 5 per cent. due by (c) as well as under (a) with the accumulations thereof, shall be paid to his legal representatives."

It was contended that the amount payable under clause (c) of para. 1 was a contingent one without any vested character and, therefore, could not be described as income in any way. The learned Judge construed the provisions of the scheme and rejected the contention. The main reason for his conclusion is stated thus :

"The result seems to me to be that I must take that sum as a sum which really has been added to the salary and is taxable, and it is not the less added to the salary because there has been a binding obligation created between the Assistant Masters and Governors of the Schools that they should apply it in a particular way."

No doubt it is possible for another Court to come to a different conclusion on the construction of the provisions of the scheme; but the learned Judge came to the conclusion that clause (c) of para. 1 of the scheme provided for an additional salary to the Assistant Masters. Indeed, the Court of Appeal in *Edwards (H. M. Inspector of Taxes) v. Roberts*² construed a similar scheme and came to the contrary con-

1. (1904) 5 T.C. 36, 46.

2. (1935) 19 T.C. 618, 638, 640.

clusion and explained the earlier decision on the basis we have indicated. There, the respondent was employed by a company under a service agreement dated 21st August, 1921, which provided *inter alia*, that in addition to an annual salary, he should have an interest in a "conditional fund", which was to be created by the company by the payment after the end of each financial year of a sum out of its profits to the trustee of the fund to be invested by them in the purchase of the company's shares or debenture stock. Subject to possible forfeiture of his interest in certain events the respondent was entitled to receive the income produced by the fund at the expiration of each financial year, and to receive part of the capital of the fund (or at the trustees' option, the investments representing the same) at the expiration of five financial years and of each succeeding year, and, on death whilst in the company's service or on the termination of his employment by the company, to receive the whole amount then standing to the credit of the capital account of the fund (or the actual investments). The respondent resigned from the service of the company in September 1927, and at that date the trustees of the fund transferred to him the shares which they had purchased out of the payments made to them by the company in the years 1922 to 1927. He was assessed to the income-tax on the amount of the current market value of the shares at the date of transfer. The assessee contended that immediately a sum was paid by the company to the trustees of the fund he became invested with a beneficial interest in the payment which formed part of emoluments for the year in which it was made, and for no other year, and that, accordingly, the amount of the assessment for the year 1927-28 ought not in any event, to exceed the aggregate of the sums paid by the company to the trustees, the difference between the amount and the value of the investments at the date of transfer representing a capital appreciation not liable to tax for any year. The Court of Appeal rejected the contention. Lord Hanworth, M. R., in rejecting the contention, observed :

".....under these circumstances there could not be said to have accrued to this employee a vested interest in these successive sums placed to his credit, but only that he had a chance of being paid a sum at the end of six years if all went well. That absence has now supervened, and he has got it by reason of the fact of his employment, or by reason of his exercising an employment of profit within Schedule E."

Maugham, L. J., said much to the same effect thus :

"The true nature of the agreement was that he was to be entitled in the events, and only in the events mentioned in Clause 8 of the agreement, to the investments made by the Company out of the net profits of the Company as provided in Clause 6."

The decision of Channell, J., in *Smyth v. Stretton*¹, was strongly relied upon before the appellate Court. But the learned Judges distinguished that case on the ground that under the scheme which was the subject-matter of that decision the sums taxed were really addition to the salary of the Assistant Master and that, in any view that decision should be confined to the facts of that case. The principle laid down by the Court of Appeal, namely, that unless a vested interest in the sum accrues to an employee it is not taxable, equally applies to the present case. As we have pointed out earlier, no interest in the sum contributed by the employer under the scheme vested in the employee, as it was only a contingent interest depending upon his reaching the age of superannuation. It is not a perquisite allowed to him by the employer or an amount due to him from the employer within the meaning of section 7 (1) of the Act. We, therefore, hold that the High Court has given correct answers to the questions of law submitted to it by the Income-tax Appellate Tribunal.

In the result, the appeal fails and is dismissed.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax, Kerala

.. Appellant*

v.

M/s. Malayalam Plantation, Ltd., Quilon

.. Respondent.

Income tax Act (XI of 1922) section 10 (2) (xv)—Business expenditure—Estate duty on shares of non-resident shareholders—Statutory liability on resident company—Payment, whether for purposes of business.

A resident company paid estate duty on the death of certain shareholders, who were not domiciled in India in respect of the principal value of the deceased's shares in the company. The payment was in pursuance of a statutory obligation under section 84 of the Estate Duty Act, 1953. In the computation of its income for the relevant account year, the company claimed before the Income-tax Officer allowance for payment of estate duty as a business expenditure, but without success. The Appellate Tribunal in appeal and the High Court on Reference upheld the assessee's claim. On appeal by the Commissioner of Income-tax by Special Leave.

Held, that the estate duty paid by the company was not an allowable deduction under section 10 (2) (xv) of the Indian Income-tax, Act, 1922.

The company as statutory agent of the deceased owners of the shares paid the sums payable by the legal representatives of the deceased shareholders. The payments have nothing to do with the conduct of the business, but made to discharge a statutory obligation unconnected with the business, though the occasion for the imposition arose because of the territorial nexus afforded by the accident of its doing business in India.

The range of the expression, "for the purposes of the business" is wide, but however wide the meaning of the expression may be, its limits are implicit in it. The purpose shall be for the business, that is to say, the expenditure incurred shall be in the carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business. It cannot include sums spent by the assessee as agent of a third party, whether the origin of the agency is voluntary or statutory. In that event, he pays the amount on behalf of another and for a purpose unconnected with the business.

Appeals by Special Leave from the Judgment and Decree, dated 19th January, 1961 of the Kerala High Court in Income-tax referred Case No. 20 of 1959.

K. N. Rajagopal Sastri, Senior Advocate (*R. N. Sachthey*, Advocate, with him), for Appellant.

Bishan Narain, Senior Advocate (*G. B. Pai*, and *T. A. Ramachandran*, Advocates, and *J. B. Dadachanji*, *O. C. Mathur* and *Ravinder Narain*, Advocates, of *M/s. J. B. Dadachanji & Co.*, with him), for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—These two appeals by Special Leave raise the question whether the estate duty paid by the resident Company, hereinafter called the assessee incorporated outside India, on behalf of members not domiciled in India is deductible from its profits in computing its assessable income under section 10 (2) (xv) of the Indian Income-tax Act, 1922, hereinafter called the Act.

The material facts are not in dispute and they may be briefly stated. The assessee is a resident Company incorporated outside India. Most of its shareholders are in the United Kingdom. During the accounting period ending March 31, 1955, it paid £1,302-9-4 and £1,303 towards estate duty which was payable on the death of certain shareholders who were not domiciled in India. The assessee debited the said amounts to revenue in its accounts in ascertaining the profits and gains of its business for the said year. Similarly, for the accounting year ending March 31, 1956, it paid a sum of £3,809-1-5 towards estate duty payable on the death of certain shareholders and debited the said amount to revenue in its accounts in ascertaining the profits and gains of its business for that year. The Income-tax Officer included the said amounts so paid towards estate duty in the profits and gains of the company for the said two accounting periods and assessed the company to income-tax for 1955-

56 and 1956-57 on that basis. The appeals preferred by the assessee to the Appellate Assistant Commissioner were dismissed. On further appeal to the Appellate Tribunal it held that the assessee was entitled to deduct the said amount in computing its profits; and on that finding it set aside the orders of the Appellate Assistant Commissioner. On an application made by the Commissioner of Income-tax, the Appellate Tribunal stated a case under section 66 (1) of the Act to the Kerala High Court, and referred the following question of law for its opinion:

"Whether on the facts and in the circumstances of the case, the estate duty paid by the Company under section 84 of the Estate Duty Act, 1953, is a revenue expenditure deductible in computing the assessee's business income for the assessment years in question?"

The High Court agreed with the view expressed by the Appellate Tribunal and answered the question referred to it in the affirmative. The present appeals by Special Leave have been filed against the said order of the High Court.

Mr. Rajagopal Sastri, learned Counsel for the Commissioner of Income-tax, raised before us the following two points: (1) The sums paid by the assessee under section 84 of the Estate Duty Act, 1953, are not expenditure of the Assessee-Company and, therefore, they cannot be deducted from its profits in computing its assessable income under section 10 (2) (xv) of the Act; and (2) even if it is revenue expenditure, it is not laid out or expended wholly or exclusively for the purpose of the assessee's business within the meaning of the said sub-clause.

Mr. Bishan Narain, learned Counsel for the respondent, supported the judgment of the High Court and contended that the said estate duty was revenue expenditure incurred by the assessee as it was put out of pocket to that extent and that it had not been proved that the assessee could legally recover the said amounts from the legal representatives of the deceased shareholders. He further argued that the said expenditure was wholly and exclusively for the purpose of the assessee's business within the meaning of section 10 (2) (xv) of the Act inasmuch as it discharged its statutory obligation in order to preserve the assets of the company.

The question raised turns upon the provisions of section 10 (2) (xv) of the Act. It reads:

"Section 10. *Business*—The tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profits and gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely:

* * * * *

(xv) any expenditure (not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusively, and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly or exclusively for the purpose of such business, profession or vocation."

The first facet of the argument turns upon the question whether the estate duty paid by the assessee is an expenditure incurred by it within the meaning of the said provision. Under section 5 of the Estate Duty Act the property of every person dying after the commencement of the said Act shall be liable to a duty called "estate duty" at the rates fixed in accordance with section 35 thereof. Under section 21 of said Act there shall not be included in the property passing on the death of the deceased, *inter alia*, movable property situated outside the territories to which the said Act extends at the time of the death of the person. Under section 53 of the said Act, where any property passes on the death of the deceased, every legal representative to whom such property so passes for any beneficial interest in possession or in whom any interest in the property so passing is at any time vested and others mentioned in the section shall be accountable for the whole of the estate duty on the property passing on the death. Section 84 thereof is aimed to reach the property of a member of a company dying outside India: the section before amendment read:

"Section 84. *Company to furnish particulars of deceased members to the Controller* :—

(1) Where a company incorporated outside India carried on business in the territories to which this Act extends and has been, treated for the purposes of the Indian Income-tax Act, 1922

(XI of 1922), as resident for two out of three completed assessments immediately preceding, such company shall, within three months of the receipt of intimation of the death of a member dying after the commencement of this Act, furnish to the Controller such particulars as may be prescribed in respect of the shares of the deceased member in the company, and shall be liable to pay estate duty at the rates mentioned in Part III of the Second Schedule, on the principal value of the shares held by the deceased in the company except in cases where the deceased member was a person domiciled in India and the person accountable has obtained a certificate from the Controller showing that either the estate duty in respect thereof has been paid or will be paid or that none is due, as the case may be."

Under this section, in the circumstances mentioned therein, a company is liable to pay estate duty in respect of the shares of the deceased member of the company on the principal value of the shares held by the deceased in the company : under this section a statutory obligation is imposed on the company to pay the estate duty on the shares of a deceased non-resident member. If such a member of a company had died in India, subject to the conditions mentioned in the section, the company would not be liable to pay the estate duty payable on the shares held by the deceased. In substance, the company is made a statutory agent to pay the said duty payable in respect of property belonging to another. Section 77 of the Estate Duty Act enables a person authorized or required to pay estate duty in respect of any property to transfer the said property for the purpose of paying the duty. This section cannot have extra-territorial operation: *Prima facie* the company cannot transfer the shares or the property of a person domiciled in a country outside India. Nor sub-section (2) of section 77, which says that

"A person having an interest in any property, who pays the estate duty in respect of that property, shall be entitled to the like charge, as if the estate duty in respect of that property had been raised by means of a mortgage to him",

has any application, for it cannot be said that the company has any legal interest in the shares owned by a third party. That apart, the said sub-section also cannot have extra-territorial operation. Nothing has been placed before us to enable us to come to the conclusion whether in England, where the concerned shareholders died, the resident company could recover the amount representing the estate duty paid by it in India from the legal representatives of the deceased shareholders. We, therefore, assume that the assessee who, as a statutory agent pays to the State the estate duty, cannot recover the same from the legal representatives of the deceased non-resident shareholders. In that situation the company would be out of pocket to the extent it paid the estate duty of the said persons. We cannot, therefore, accede to the contention of the learned Counsel for the appellant that the amounts paid by the assessee towards estate duty were not expenditure incurred by it, but only amounts paid by it on account with a right to recover the same from the persons on whose behalf it paid.

The next question is whether the said expenditure was expended wholly and exclusively for the purpose of the business of the assessee within the meaning of section 10 (2) (xv) of the Act. The crucial words of the section relevant to the present enquiry are "for the purpose of such business". Sub-section (2), clause (xv) is a residuary clause which provides for allowing the items of business expenditure not covered by the other clauses of sub-section (2) of section 10 of the Act. Before the Amending Act of 1939, the language of the predecessor of this clause read thus :

"Not being in the nature of capital incurred solely for the purpose of earning such profits or gains."

The Amending Act of 1939 substituted the present clause and made it more comprehensive by using the expression "for the purpose of such business". Some of the decisions cited at the Bar, both English and Indian, throw some light on the construction of the said expression and we would, therefore, briefly notice them.

The House of Lords in *Strong & Company of Ramsey, Limited v. Woodfield*¹, constituted a corresponding provision in the Income-tax Act of the United Kingdom, the relevant part whereof read : "money wholly and exclusively laid out or expended for the purposes of such concern". There, a brewing company, which also owned

licensed houses in which it carried on the business of inkeepers, incurred damages and costs to the amount of £1,490 on account of injuries caused to a visitor staying at one of its houses by falling in of a chimney. The House of Lords held that the damages and costs were not allowable as a deduction in computing the company's profits for income-tax purposes. The learned Lord Chancellor said :

"They cannot be deducted if they are mainly incidental to some other vocation, or fall on the trader in some character other than that of a trader."

Lord Davey, whose dictum was the basis for some of the subsequent decisions in that country, referring to the expression "for the purpose of trade", observed as follows :

"It is not enough that the disbursement is made in the course of, or arises out of, is connected with, the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

Lord Davey's definition appears to be much narrower than that of the Lord Chancellor, for the former restricts the expression to mean that the expenditure should have been made only for the purpose of earning profits. Finlay, J., in *Allen v. Farquharson Brothers, Limited*¹, noticed that the qualification "for the purpose of earning profits" was a slight expansion of the words of the statute though he expressed the view that it brought out the real import of the relevant section. In *Rowntree & Company, Ltd. v. Curtis (H. M. Inspector of Taxes)*², in disallowing the deduction claimed by a company of a sum set aside for the relief of the invalid employees, Rowlatt, J., applied the test whether the said expenditure incurred by the company was for the purpose of earning profits. In *Cooke v. Quack Shoe Repair Service*³, the Court allowed a deduction in respect of sums paid by the respondent-firm in discharging the liabilities of the business outstanding at the date the said respondent purchased the business from a third party on the ground that the said expenditure, having been incurred for the purpose of preserving the goodwill and for ensuring the continuity of supply of raw material and labour, was wholly and exclusively laid out for the purpose of its business. After referring to earlier decisions, Croom-Johnson, J., made the following observation :

"Here is a payment made in the circumstances of this case in order to ensure a supply of leather for the business, a payment made in order to ensure a continuance of a labour willing to be employed in this business, and payment, for rent in order to ensure that the landlord's consent to assignment of the premises in which the business was carried on, should not be refused. I find it quite impossible to say that there is no evidence to justify those findings."

Here it will be noticed that the learned Judge went beyond the limited scope given by Lord Davey to the expression in the statute and did not confine it to the amounts spent only for earning profits, but to expenditure incurred in connection with the business. Where a company incurred an expenditure in defending its title to property, it was held in *Southern (H.M. Inspector of Taxes) v. Borax Consolidated, Ltd.*⁴, that the said amount was spent wholly and exclusively for the purpose of the company's trade and was, therefore, an allowable deduction for the purpose of computing the profits of the company for Income-tax purposes. This decision gives a more liberal meaning to the expression "for the purpose of the trade" than that given by Lord Davey. "Purpose" of the trade includes the purpose to protect the assets of the company carrying on the trade. The House of Lords resurveyed the legal position in *Morgan, Inspector of Taxes v. Tate and Lyle, Ltd.*⁵, in the context of the question whether the expenditure incurred by a company engaged in sugar refining in a propaganda campaign to oppose the threatened nationalization of the industry was an admissible deduction. Lord Morton, after referring to the relevant case-law and to Lord Davey's formula, made the following observations :

".....this seems to me to be an assumption wholly unwarranted by the evidence. There is no evidence that a transfer of the assets to a national body or authority would not destroy or adversely affect the company's business..... It is clear on the authorities that Lord Davey's formula includes expenditure for the purpose of preventing a person from being disabled from carrying on and earning profits in the trade."

1. (1932) 17 T.C. 59, 65.

2. (1924) 8 T.C. 678 : L.R. (1925) 1 K.B. 328.

3. (1949) 30 T.C. 460, 466.

4. (1942) 10 I.T.R. (Suppl.) 1, 8 : L.R. (1941)

1 K.B. 111 : (1940) 4 All E.R. 412 : 23 T.C. 597.

5. (1954) 26 I.T.R. 195, 205, 206, 219 : L.R.

(1955) A.C. 21 : (1954) All E.R. 413 : 35 T.C. 406.

Lord Reid laid down the relevant test thus :

"A general test is whether the money was spent by the person assessed in his capacity of trader or in some other capacity—whether on the one hand the expenditure was really incidental to the trade itself or on the other hand it was mainly incidental to some other vocation or was made by the trader in some other capacity than that of trader."

This decision also restated the two tests namely, (i) that the expenditure should be for carrying on the business to earn profits in the trade, and (ii) that the expenditure shall be incurred by the assessee in his capacity of a person carrying on the business. Lord Greene, M.R., in *Rushden Heel Co., Ltd. v. Keene*¹, re-affirmed the second test in the following words :

"I find, however, in *Strong & Company's case*², what appears to me to be a clear answer to the present appeal. It is, I think, a matter not of dictum but of decision in that case that an expense is not deductible if it falls on a trader in some character other than that of a trader. This was the ground of the opinion of Lord Loreburn, L.C., with which Lords Macnaghten and Atkinson agreed. There Lordships held that the expense there in question fell upon the appellants in their character not of traders but of householders."

In *Smith v. Lion Brewery Co., Ltd.*³, the question was whether a brewery company, which was owner and lessee of a number of licensed premises where business was carried on the tide-house basis, was entitled to deduct for the purposes of Income-tax its liability in respect of compensation fund charges under the Licensing Act, 1904. It was contended by the Crown that the liability to which the Company became subject was in its capacity as landlord of the property and not as trader carrying on the trade of brewer. When the case ultimately came up before the House of Lords, the House was equally divided. The view of two of the members who agreed with the view of the Court of Appeal prevailed. The basis of the judgment was that the liability was wholly and exclusively related to the carrying on of the company's business, because on the facts of that case the company had assumed the position of landlord for the purpose of its trade. If the finding was that the company paid the tax in its capacity as landlord as opined by the learned Lords who dissented, the result would have been the other way. In *Harrods (Buenos Aires), Ltd. v. Taylor-Gooby (H. M. Inspector of Taxes)*⁴, Buckley, J., covered the entire ground over again in the context of a question whether the appellant-company therein which was incorporated and resident in the United Kingdom and carrying on the business of a large general stores in Buenos Aires, having paid in Argentina a tax known as the "substitute tax" to which it was liable, could claim deduction under the Income-tax Act, 1952 (15 and 16 Geo. VI, and 1 Eliz. II, c. 10, s. 137 (a)). The learned Judge held on the facts of that case that incurring liability for that tax was a pre-condition of the Company's earning profits in the Argentina, for without incurring liability for that tax the Company could not carry on business in the Argentina at all. On that finding the learned Judge came to the conclusion that it was a liability which the Company had undertaken for the purpose of its trade, and was, therefore, a payment made wholly and exclusively for the purpose of the company's trade. It will be seen that in that case the tax was paid by the Company in its capacity as company doing business and unless that tax was paid the company could not carry on its business. The two tests laid down are satisfied.

Pausing here, we shall briefly recapitulate the legal position in England. The relevant wordings of the section with which the English Judges were concerned are, in effect, similar to the terms of section 10 (2) (xv) of the Indian Income-tax Act, 1922. The test laid down by Lord Davey in *Strong & Company of Ramsey, Ltd. v. Woodfield*², namely, the disbursement must be made for the purpose of earning profits, has been accepted and followed throughout, though the content of that test has been expanded to meet diverse situations. Broadly, English Courts applied two tests to ascertain whether a deduction was permissible or not, namely, (1) whether the expenditure was incurred for the purpose of carrying on of the business and for

1. (1948) 2 All E.R. 378 : 30 T.C. 298, 316.

2. L.R. (1906) A.C. 448 : 5 T.C. 215, 219, 220.

3. L.R. (1911) A.C. 150 : 5 T.C. 568.

4. Appeal No. 2048 (Ch. D.) decided on 25th March, 1963 (unreported).

removing obstacles and impediments in the conduct of the business, and (ii) whether the assessee paid the amount in his capacity as businessman or in his personal capacity.

Now coming to the Indian decisions, a Division Bench of the Bombay High Court in *Tata Sons, Ltd. v. Commissioner of Income-tax, Bombay*¹, held that the share of bonus voluntarily paid by a company, which held the managing agency of another company, to some of the officers of the managed company was a permissible deduction under section 10 (2) (xv) of the Act. The reason for the conclusion is stated thus :

"But having considered the whole case and the question submitted to us I am satisfied that looking at it purely from the point of view of commercial principles what the assessee company has done is something which had as its object increasing the profits of the Tata Iron and Steel Co., and thereby increasing its own share of the commission."

In *Badridas Daga v. Commissioner of Income-tax*², where the agent of the assessee misappropriated his money and the assessee claimed the part of the amount misappropriated and not recovered from the agent as a deduction under section 10 (2) (xv) of the Act for the purpose of Income-tax, this Court held that it was not allowable under section 10 (2) (xi) or section 10 (2) (xv) of the Act. Venkatarama Ayyar, J., observed :

"The result is that when a claim is made for a deduction for which there is no specific provision in section 10 (2), whether it is admissible or not will depend, on whether having regard to accepted commercial practice and trading principles, it can be said to arise out of the carrying on of the business and to be incidental to it."

This decision, though not directly in point, lays down the principle that an expenditure can be deducted only if it arises out of the carrying on of the business and is incidental to it. In *Indian Molasses Co. (Pvt.), Ltd. v. Commissioner of Income-tax, W.B.*³, this Court held that section 10 (2) (xv) of the Act enacted affirmatively what was stated in the negative form in the English statute and was substantially in *pari materia* with the English enactment and the Courts might consider the English authorities as aids to the interpretation thereof. The decision of this Court in *Commissioner of Income-tax, Bombay v. Abdullabhai Abdulkadar*⁴, though it turns upon the provisions of section 10 (1) of the Act, gives some assistance in deciding the question raised. One of the questions raised was whether the tax paid by the assessee-firm as an agent of the non-resident principal could be claimed as a bad debt or a trading loss. In the words of Kapur, J.,

"The loss which the appellant has incurred is not in its own business but the liability arose because of the business of another person and that is not permissible deduction within section 10 (1) of the Act."

It is true that this decision did not arise under section 10 (2) (xv) of the Act, but the principle that the expenditure incurred by the assessee in his capacity as agent of another is not a deductible item equally applies to the present case.

This Court in *The Commissioner of Income-tax, W. B. v. Royal Calcutta Turf Club*⁵, had to consider the question whether an expenditure incurred by a race club for the purpose of training jockeys of the club was an allowable deduction within the meaning of section 10 (2) (xv) of the Act. Kapur J., speaking for the Court after considering the relevant decisions, concluded thus :

"Applying the law, as laid down in those cases, to the present case the conclusion is that the amount in dispute was laid out wholly and exclusively for the purpose of the respondent's business, because if the supply of jockeys of efficiency and skill failed, the business of the respondent would no longer be possible. Thus the money was spent for the preservation of the respondent's business."

This decision gives a liberal interpretation to the relevant expression. In *M/s. Haji Aziz and Abul Shakoor Bros. v. The Commissioner of Income-tax, Bombay City-II*⁶, this Court disallowed deduction of the amount paid by a firm as penalty

1. I.L.R. 1950 Bom. 9 : 18 I.T.R. 460, 472.

2. (1958) S.C.J. 963 : (1958) 2 M.L.J. (S.C.) 168 : 24 I.T.R. 10, 15.

3. (1959) 2 S.C.R. (Sup.) 964 : A.I.R. 1959 S.C. 1049.

4. A.I.R. 1961 S.C. 701 : (1961) 2 S.C.J. 172.

5. (1961) 2 S.C.R. 729, 735, 736 : (1961) 1 S.C.J. 632.

6. (1961) 1 S.C.J. 625 : (1961) 2 S.C.R. 651, 663.

to release the consignment confiscated by the Customs Authorities. In coming to the conclusion, Kapur, J., speaking for the Court, observed :

"The words 'for the purpose of such business' have been construed in *Inland Revenue v. Anglo-Brewing Co. Ltd.*¹, to mean "for the purpose of keeping the trade going and of making it pay".

After considering the relevant decisions, the learned Judge proceeded to state thus :

"They cannot be deducted if they fall on the assessee in some character other than that of a trader. Therefore, where a penalty is incurred for the contravention of any specific statutory provision, it cannot be said to be a commercial loss falling on the assessee as a trader, the test being that the expenses which are for the purpose of enabling a person to carry on trade for making profits in the business are permitted but not if they are merely connected with the business."

No doubt this judgment is really based upon the fact that an expense which is paid by way of penalty for breach of law cannot be said to be an amount wholly and exclusively laid out for the purpose of the business ; but the observations in the decision go further and indicate that the expenditure, if incurred by the trader in some character other than that of a trader, is not an allowable deduction.

The aforesaid discussion leads to the following result : The expression "for the purpose of the business" is wider in scope than the expression "for the purpose of earning profits". Its range is wide : it may take in not only the day-to-day running of a business, but also the rationalization of its administration and modernization of its machinery ; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title ; it may also comprehend payment of statutory dues and taxes imposed as a precondition to commence or for carrying on of a business ; it may comprehend many other acts incidental to the carrying on of a business. However wide the meaning of the expression may be, its limits are implicit in it. The purpose shall be for the purpose of the business, that is to say, the expenditure incurred shall be in the carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business. It cannot include sums spent by the assessee as agent of a third party, whether the origin of the agency is voluntary or statutory ; in that event, he pays the amount on behalf of another and for a purpose unconnected with the business.

In the present case, the company, as a statutory agent of the deceased owners of the shares, paid the sums payable by the legal representatives of the deceased shareholders. The payments have nothing to do with the conduct of the business. The fact that on his default, if any, in the payment of the dues the Revenue may realise the amounts from the business assets is a consequence of the default of the assessee in not discharging his statutory obligation, but it does not make the expenditure any the more expenditure incurred in the conduct of the business. It is manifest that the amounts in question were paid by the assessee as a statutory agent to discharge a statutory duty unconnected with the business, though the occasion for the imposition arose because of the territorial nexus afforded by the accident of its doing business in India.

We, therefore, hold that the estate duty paid by the respondent was not an allowable deduction under section 10 (2) (xv) of the Act. We answer the question in the negative. The order of the High Court is wrong and is set aside.

In the result, the appeals are allowed with costs. One set of hearing fees.

V. S.

Appeals allowed.

THE SUPREME COURT OF INDIA.

PRESENT : K. SUBBA RAO, J. C. SHAH AND S.M. SIKRI, JJ.

Dr. Sham Lal Narula

.. Appellant*.

v.

Commissioner of Income-tax, Punjab, Jammu and Kashmir,
Himachal Pradesh and Patiala

.. Respondent.

Income-tax Act (XI of 1922)—section 4—Revenue or capital receipt—Interest—Compulsory acquisition of land—Delayed compensation—Statutory interest—Whether taxable.

The statutory interest paid under section 34 of the Land Acquisition Act is interest paid for the delayed payment of the compensation amount and, therefore, is a revenue receipt liable to tax under the Income-tax Act. The scheme of the Land Acquisition Act and its express provisions establish that the statutory interest payable under section 34 is not compensation paid to the owner for depriving him of his right to possession of the land so acquired, but that given to him for the deprivation of the use of the money representing the compensation.

“Interest”, whether it is statutory or contractual, represents the profit the creditor might have made if he had the use of the money or the loss he suffered because he had not that use. It is something in addition to the capital amount though it arises out of the capital amount.

When the Legislature designedly used the word “interest” in section 34 of the Land Acquisition Act in contradistinction to the amount awarded, there is no reason why the expression should not be given the natural meaning it bears.

Appeal from the Judgment and Order dated 31st January, 1962 of the Punjab High Court in I.T.R. No. 28 of 1960.

B. N. Kirpal and A. N. Kirpal, Advocates, for Appellant.

Gopal Singh and R. N. Sachthey, Advocates, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by certificate granted by the High Court of Punjab raises the question whether interest paid under section 34 of the Land Acquisition Act, 1894, hereinafter called the Act, is of the nature of a capital receipt or of a revenue receipt.

The relevant facts are not in dispute and they may be briefly stated. The appellant, Dr. Shamlal Narula, is the manager of a Hindu undivided family, which owned, *inter alia*, 40 bighas and 11 biswas of land in the town of Patiala. The Patiala State Government initiated land acquisition proceedings for acquiring the said land under Regulations then prevailing in the Patiala State. It is common case that the State Regulations are *in pari materia* with the provisions of the Act. The State of Patiala first merged into the Union of Pepsu and later the Union of Pepsu merged into the State of Punjab. It is also common case that there was a Land Acquisition Act in the Union of Pepsu containing provisions similar to those obtaining in the Act. On 6th October, 1953, the Act was extended to the Union of Pepsu. On 30th September, 1955, the Collector of Patiala made an award under the Act as a result of which the appellant received on 1st December, 1955, a sum of Rs. 2,81,822, which included a sum of Rs. 48,660 as interest up to the date of the award. For the year 1956-57, the Income-tax Officer included the said interest in the income of the Hindu undivided family of which the appellant is the manager, and assessed the same to income-tax, after overruling the appellant's contention that the said interest was a capital receipt and, therefore, not liable to tax. On 14th June, 1957, the Appellate Assistant Commissioner confirmed the order of the Income-tax Officer. The appellant preferred an appeal to the Income-tax Appellate Tribunal. The said Tribunal by its order dated 9th July, 1957, held that the said amount representing the interest was a capital receipt and on that finding the said amount was excluded from the

total income of the assessee. At the instance of the Commissioner of Income-tax the said Tribunal referred the following question to the High Court of Punjab under section 66 (1) of the Income-tax Act, 1922:

"Whether on a true interpretation of section 34 of the Land Acquisition Act and the Award given by the Collector of Pepsu on the 30th September, 1955, the sum of Rs. 48,660, was capital receipt not liable to tax under the Indian Income-tax Act?"

The said Reference was heard by a Division Bench of the High Court and it held that the said amount was not a capital, but a revenue, receipt and as such liable to tax under the Indian Income-tax Act. Hence the present appeal.

Learned Counsel for the appellant raised before us two contentions, namely, (i) the sum of Rs. 48,660 received by the appellant under the award was compensation for depriving him of his right to possession of his property and was, therefore, a capital receipt not liable to tax; and (ii) whatever may be the character of the amount awarded under section 34 of the Act by way of interest in a case where possession of the land has been taken by the State after the award, in a case where possession of the land acquired has been taken before the award, it would be a capital receipt, for it is said that in the latter the interest necessarily takes the character of compensation for depriving the owner of the land of his right to possession.

On behalf of the Revenue the order of the High Court is sought to be sustained for the reasons stated therein.

The question raised turns upon the true meaning of the provisions of section 34 of the Act. It reads:

"When the amount of such compensation is not paid or deposited on or before taking possession of the land, the Collector shall pay the amount awarded with interest thereon at the rate of six per centum per annum from the time of so taking possession until it should have been so paid or deposited."

The section itself makes a distinction between the amount awarded as compensation and the interest payable on the amount so awarded. The interest shall be paid on the amount awarded from the time the Collector takes possession until the amount is paid or deposited. To appreciate the scope of the section it is necessary to notice briefly the scope of an award and the manner in which possession is taken under the Act. After the statutory notifications are issued and the requisite notice is given to the persons interested in the land so acquired, the Collector, after holding the necessary enquiry, makes an award, *inter alia*, determining the amount of compensation payable for the land so acquired. Section 15 of the Act says that in determining the amount of compensation the Collector shall be guided by the provisions contained in sections 23 and 24. Section 23 provides for the matters to be considered in determining compensation; section 24 describes the matters to be neglected in determining the compensation. A perusal of the provisions of section 23 shows that interest is not an item included in the compensation for any of the matters mentioned therein; nor is it mentioned as a consideration for the acquisition of the land. Under clause (2) of section 23, the Legislature in express terms states that in addition to the market value of the land the Court shall in every case award a sum of 15 per cent. of such market value in consideration of the compulsory nature of the acquisition. If interest on the amount of compensation determined under section 23 is considered to be a part of the compensation or given in consideration of the compulsory nature of the acquisition, the Legislature would have provided for it in section 23 itself. But instead, payment of interest is provided for separately under section 34 in Part V of the Act under the heading "Payment". It is so done, because interest pertains to the domain of payment after the compensation has been ascertained. It is a consideration paid either for the use of the money or for forbearance from demanding it after it has fallen due. Therefore, the Act itself makes a clear distinction between the compensation payable for the land acquired and the interest payable on the compensation awarded.

Another approach to the problem leads to the same result. Under section 16 of the Act when the Collector has made an award under section 11 he may take possession of the land which shall thereupon vest absolutely in the Government free from all encumbrances. Under section 17 thereof:

"In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any waste land or arable land needed for public purposes or for a Company. Such a land shall thereupon vest absolutely in the Government, free from all encumbrances."

Under both the sections the land acquired vests absolutely in the Government after the Collector has taken possession in one case after the making of the award and in the other, even before the making of the award. In either case, some time may lapse between the taking of possession of the acquired land by the Collector and the payment or deposit of the compensation to the person interested in the land acquired. As the land acquired vests absolutely in the Government only after the Collector has taken possession of it, no interest therein will be outstanding in the claimant after the taking of such possession; he is divested of his title to the land and his right to possession thereof, and both of them vest thereafter in the Government. Thereafter he will be entitled only to be paid compensation that has been or will be awarded to him. He will be entitled to compensation, though the ascertainment thereof may be postponed, from the date of his title to the land and the right to possession thereof have been divested and vested in the Government. It is as it were that from that date the Government withheld the compensation amount which the claimant would be entitled to under the provisions of the Act. Therefore, a statutory liability has been imposed upon the Collector to pay interest on the amount awarded from the time of his taking possession until the amount is paid or deposited. This amount is not, therefore, compensation for the land acquired or for depriving the claimant of his right to possession, but is that paid to the claimant for the use of his money by the State. In this view there cannot be any difference in the legal position between a case where possession has been taken before and that where possession has been taken after the award, for in either case the title vests in the Government only after the possession has been taken.

The Legislature expressly used the word "interest" with its well known connotation under section 34 of the Act. It is, therefore, reasonable to give that expression the natural meaning it bears. There is an illuminating exposition of the expression "interest" by the House of Lords in *Westminster Bank, Ltd. v. Riches*¹. The question there was whether, where in an action for recovery of any debt or damages the Court exercises its discretionary power under a statute and orders that there shall be included in the sum for which the judgment is given interest on the debt or damages, the sum of interest so included is taxable under the Income-tax Acts. If the said amount was "interest on money" within Schedule D and the General Rule 21 of the All Schedules Rules of the Income-tax Act, 1918, income-tax was payable thereon. In that context it was contended that money awarded as damages for the detention of money was not interest and had not the quality of interest. Lord Wright observed :

"The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the money was due to him under a contract express or implied, or a statute, or whether the money was due for any other reason in law. In either case the money was due to him and was not paid or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute, as for instance under section 57 of the Bills of Exchange Act, 1882, or was unliquidated and claimable under the Act as in the present case. The essential quality of the claim for compensation is the same, and the compensation is properly described as interest."

This passage indicates that interest, whether it is statutory or contractual, represents the profit the creditor might have made if he had the use of the money or the loss he suffered because he had not that use. It is something in addition to the capital amount, though it arises out of it. Under section 34 of the Act when the Legislature designedly used the word "interest" in contradistinction to the amount awarded, we do not see any reason why the expression should not be given the natural meaning it bears.

The scheme of the Act and the express provisions thereof establish that the statutory interest payable under section 34 is not compensation paid to the owner for depriving him of his right to the possession of the land acquired, but that given to him for the deprivation of the use of the money representing the compensation for the land acquired.

We shall now proceed to consider the case-law cited at the Bar. Where a Tribunal directed the Improvement Trust, under the provisions of section 28 of the Land Acquisition Act, to pay interest to the assessee from the date of taking possession of the property to the date of payment, a Division Bench of the Allahabad High Court held, in *Behari Lal Bhargava v. Commissioner of Income-tax, C. P. and U.P.*¹, that the interest so awarded was in the nature of compensation for the loss of the assessee's right to retain possession of the property acquired and, therefore, was not income liable to tax. The reason for the said conclusion is stated thus :

"It is not the 'fruit of a tree'—to borrow the simile used in *Shaw Wallace's case*²,—but was compensation or damages for loss of the right to retain possession; and it seems to us that section 28 was designed as a convenient method of measuring such damages in terms of interest."

As we have pointed out earlier, as soon as the Collector has taken possession of the land either before or after the award the title absolutely vests in the Government and thereafter, the owner of the land so acquired ceases to have any title or right of possession to the land acquired. Under the award he gets compensation for both the rights. Therefore, the interest awarded under section 28 of the Act, just like under section 34 thereof, cannot be a compensation or damages for the loss of the right to retain possession but only compensation payable by the State for keeping back the amount payable to the owner. Adverting to the said decision a Division Bench of the Madras High Court in *Commissioner of Income-tax, Madras v. CT. RM. N. Narayanan Chettiar*³, observed :

".....with great respect we find ourselves unable to follow the reasoning. Certainly we are not prepared to accept the judgment as a guide to the decision in the present case."

So was the interest granted to an assessee under section 18-A of the Income-tax Act on the advance payment of tax by him under the provisions of that section held to be income taxable in his hand : see *Commissioner of Income-tax, Bihar and Orissa v. Maharajadhiraj Sir Kameshwar Singh*⁴. There, when the decision of the Allahabad High Court in *Behari Lal Bhargava's case*¹, was relied upon, the learned Judges refusing to follow it, observed thus :

"It is not a matter of discretion for the Central Government but the duty to pay interest is imposed by the statute. Apart from this I think (with great respect) that the Allahabad decision is of doubtful authority. The decision is not consistent with the principle laid down in *Schulze v. Bensted*⁵ and *Commissioners of Inland Revenue v. Barnato*⁶. The Madras High Court expressly declined to follow the Allahabad case in *Commissioner of Income-tax v. Narayanan Chettiar*.³"

The Kerala High Court in *P. V. Kurien v. Commissioner of Income-tax, Kerala*⁷ held that interest paid on the enhanced amount of compensation directed to be paid by an appellate Court in an appeal against an award of compensation for compulsory acquisition of land under the Land Acquisition Act represented capital and was not income liable to be taxed under the Indian Income-tax Act. It was argued there, as is argued before us, that the interest awarded was a capital sum estimated in terms of interest. In coming to the conclusion which they did, the learned Judges relied upon the decision of the Judicial Committee in *Inglewood Pulp and Paper Co., Ltd. v. New Brunswick Electric Power Commission*⁸, and that of the Madras High Court in *Revenue Divisional Officer, Trichinopoly v. Venkatarama Ayyar*⁹. In the former, the Judicial Committee directed the purchaser who had taken delivery and possession of the property he had purchased before the sale to

1. I.L.R. (1941) All. 54 : A.I.R. 1941 All. 135: 206.
9 I.T.R. 9, 24.

2. L.R. 59 I.A. 206 : I.L.R. 59 Cal. 1343 :
63 M.L.J. 124 (P.C.).

3. (1943) 23 I.T.R. 470, 477 : I.L.R. (1944)
Mad. 245 : (1943) 2 M.L.J. 316.

4. (1933) 23 I.T.R. 212, 225 : I.L.R. 32 Punj.

5. (1915) 7 T.C. 30.

6. (1934-36) 20 T.C. 455.

7. (1962) 46 I.T.R. 288 : (1963) 1 I.T.J. 82.

8. 111 I.C. 261 : A.I.R. 1928 P.C. 287.

9. I.L.R. 59 Mad. 433 : 71 M.L.J. 69.

pay interest to the vendor on the purchase money from the date he had taken possession on the ground that "the right to receive interest takes the place of the right to retain possession and is within the rule"; and in the latter, though it arose under the Land Acquisition Act, possession was taken by the Government under circumstances falling outside the scope of sections 16 and 17 of the said Act. In both the cases the title did not pass to the vendee in one case and to the State in the other when possession was taken by them and, therefore, it may be said that the owner was given interest in place of his right to retain possession of the property. But in a case where title passes to the State, the statutory interest provided thereafter can only be regarded either as representing the profit which the owner of the land might have made if he had the use of the money or the loss he suffered because he had not that use. In no sense of the term can it be described as damages or compensation for the owner's right to retain possession, for he has no right to retain possession after possession was taken under section 16 or 17 of the Act. We, therefore, hold that the statutory interest paid under section 34 of the Act is interest paid for the delayed payment of the compensation amount and, therefore, is a revenue receipt liable to tax under the Income-tax Act. The order of the High Court is therefore, correct.

In the result, the appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J.C. SHAH AND S.M. SIKRI, JJ.

The State of Madhya Pradesh and others

.. *Appellants**

v.

Sirajuddin Khan

.. *Respondent.*

Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1 of 1951), section 8 and Schedule I, rules 2 (2) and 8 (1).—Abolition of zamindari estates—Compensation on the basis of net income—Statute providing for deduction of income-tax from gross income—Deduction of super-tax, whether permissible.

Under the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951) the proprietary rights of the Zamindar, in the estate vested in the State and he was paid compensation therefor calculated at the rate of 10 times the net income is provided for under the Rules. The net income was to be calculated by deducting from the gross income, *inter alia*, the average of the income-tax paid in respect of the income from big forest during 10 agricultural years preceding 31st March, 1951. The Compensation Officer in calculating the compensation payable for the respondent deducted from the gross income, not only the income-tax paid by him but also the super-tax and surtax paid by him, and this was confirmed by the higher authority. The respondent applied to the High Court under Articles 226 and 227 of the Constitution and the High Court allowed the petition and quashed the orders holding that deduction of super-tax and surtax are not authorised by the Act. On appeal by the State to the Supreme Court.

Held, that super-tax should not be taken into consideration for calculating the compensation payable to a zamindar on taking over of his rights in the estate.

There are pronounced differences between the incidents of income-tax and super-tax. While super-tax, except in a few cases, is payable by the assessee direct, the income-tax is payable by him direct as well as by deduction. Though both the taxes are assessed on the total income of a person, the total income for the purpose of income-tax is computed on the basis of income classified under the different heads mentioned in section 6 of the Income-tax Act of 1922, whereas super-tax is not concerned with the different heads but is payable on the total income so ascertained. It is not possible legally to predicate what particular part of the super-tax is attributable to an income from a particular source.

The qualification that income-tax paid should have been in respect of the income received from the big forest necessarily excludes super-tax, for under the Income-tax Act no super-tax is payable in respect of the income received from big forest, but only in respect of the total income. As the rule is concerned with the calculation of the net income from the estate after making certain deductions, only those deductions which have direct relation to that income are allowed.

If the Legislature has used the expression 'income-tax' in the Rules, with the knowledge that under the Income-tax Act, two separate taxes, namely, income-tax and super-tax are imposed, the attention must be that the expression will refer only to income-tax and not to super-tax.

Appeal by Special Leave from the Judgment and Order dated 22nd January, 1960 of the Madhya Pradesh High Court in Misc. Petition No. 35 of 1959.

B. Sen, Senior Advocate (*I. N. Shroff*, Advocate, with him), for Appellant.

K. N. Rajagopal Sastri, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave raises the question whether the expression “income-tax” in clause (c) of sub-rule (2) of rule 2 of Schedule I to the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (M.P. 1 of 1951), hereinafter called the Act, includes super-tax.

The facts are as follows. The respondent was the zamindar of Bhadra Estate in Balaghat District of Madhya Pradesh. His estate was known as Bahela Zamindari consisting of 78 villages. The Act came into force on 25th January, 1951. Under the Act the proprietary rights of the zamindari vested in the State and he became entitled to compensation in respect of the said rights in the said villages under section 8 of the Act. The compensation was to be determined in accordance with the Rules contained in Schedule I to the Act. Under rule 8 of Schedule I the zamindar would be entitled to compensation at 10 times the net income. The net income would be calculated by deducting from the gross income, *inter alia*, the average of the income-tax paid in respect of the income from big forest during 30 agricultural years preceding 31st March, 1951. On 30th November, 1951, the Compensation Officer determined the compensation payable to the respondent at Rs. 2,21,330-12-6. In arriving at that figure he deducted not only the income-tax payable by the respondent but also the super-tax and surcharge payable by him. The average of the income-tax paid by him during the material 30 years was only Rs. 3,760-2-9, but if the average of the super-tax and surcharge was included, the average came to Rs. 7,070-8-0. The result was that the net yearly income of the estate was reduced by Rs. 3,310-5-3 and compensation was paid to him on the basis of the amount so reduced. The respondent moved the Settlement Commissioner under section 15 of the Act for enhancement of the compensation, but the Commissioner confirmed the order of the Compensation Officer. Thereafter, the respondent filed an application in the High Court under Articles 226 and 227 of the Constitution for quashing the order of the Compensation Officer. The High Court held, on a construction of the relevant provisions of the Act, that super-tax should not be taken into account while calculating the compensation payable to the respondent. The State of Madhya Pradesh has filed the present appeal against the order of the High Court.

Mr. Sen, learned Counsel for the State, contends that the object of rule 2 (2) (c) is to provide a method for ascertaining the net income of an estate, that in that context there cannot be any justifiable distinction between income-tax and super-tax, for both of them have, *inter alia*, to be deducted from the gross income to arrive at the net income, and that the Legislature used the word “income-tax” in its comprehensive sense so as to take in super-tax. He adds that under the Income-tax Act super-tax is only an additional duty of income-tax and, therefore, a part of it.

Mr. Rajagopal Sastri, learned Counsel for the respondent-assessee, argues that in construing a provision of an expropriatory Act the Court will have to construe such a provision strictly and if so construed, super-tax cannot be included in the expression “income-tax”. He took us through the relevant provisions of the Income-tax Act to support his contention that super-tax is different in its origin, description, scope, incidents and collection from the income-tax.

The question turns upon the correct interpretation of rule 2 (2) (c) of the Rules of Schedule I to the Act. The relevant provisions of the Act and the rule read :

Section 8 (1) of the Act.—“The State Government shall pay to every proprietor, who is divested of proprietary rights, compensation determined in accordance with the rules contained in Schedule I.”

Schedule I to the Act, Rule 2 (2).—The net income of an estate or mahal in the Central Provinces shall be calculated by deducting from the gross income the sums under the following heads, namely :—

* * * * *

(c) the average of the income-tax paid in respect of the income received from big forest during the period of thirty agricultural years preceding the agriculture year in which the relevant date falls ;

* * * * *

Rule 8. (1) The amount of compensation in the Central Provinces and, in Berar shall be ten times the net income determined in accordance with the rules herein contained.

The combined effect of the said provisions is that for the purpose of ascertaining the net income of an estate one of the deductible items is the average of the income-tax paid in respect of the income received from the big forest. That average is ascertained on the basis of the income-tax paid during the 30 agricultural years preceding the agricultural year in which the relevant date falls. The compensation payable is ten times the net income ascertained under the Rules. The relevant date for the purpose of ascertaining the average is the date specified by notification by the State Government under section 3 of the Act : for instance, if the relevant date falls in the year 1951, the income-tax paid during the years 1921 to 1951 will afford the basis for arriving at the average.

To appreciate the distinction between the concepts of income-tax and super-tax a brief history of their incidents will not be inappropriate. Under the Income-tax Act of 1886 the total income from various sources was not the criterion for assessment but the different sources alone were the basis for it. For the first time the 1918 Act introduced the scheme of total income for the purpose of determining the rate of tax. Under that Act several heads were enumerated, under which the income of an assessee fell to be charged. The 1922 Act went further and enacted that loss under one head of "income" can be set-off against the profit under another head. Till the 1922 Act super-tax was separately levied. It was first introduced by the Super-tax Act of 1917 and then it was replaced by the 1920 Act. Only in 1922, for the first time, it was incorporated in the Income-tax Act. Though both the taxes are dealt with by the same Act, their distinctive features are maintained. As regards income-tax, in the words of a learned author, "section 3 charges the total income, section 4 defines its range, section 6 qualifies it and sections 7 to 12 quantify it". There are various other sections which provide the machinery for the ascertainment of the total income for assessment and recovery of tax. As regards super-tax, a separate chapter, viz., Chapter IX, deals with it ; it comprises sections 55 to 58. Section 55 is the charging section for the purpose of super-tax ; under that section,

"In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year . . . an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by a Central Act."

Section 56 says that for the purpose of super-tax, except in specified cases, the total income shall be the total income as assessed for the purpose of income-tax. Section 56-A exempts from super-tax certain dividends. Section 58 (1) applies by reference to super-tax certain provisions of the Act relating to the charge, assessment, collection and recovery of income-tax. It would be seen from this Chapter that though super-tax is described as an additional duty of income-tax it is not incorporated in the income-tax ; its identity is maintained. A self-contained Chapter deals with the charge, assessment, collection and recovery of super-tax. There are essential differences between the two taxes emanating not only from the express provisions contained in Chapter IX but also from the omission to apply the specified sections of the Act to the said tax. Successive Finance Acts also made a distinction between the two taxes.

This is not the occasion to notice in detail the differences between the two taxes. It is enough to state that there are pronounced differences between the incidents of the two taxes. But two relevant differences may be noticed, namely : (i) though both the taxes are assessed on the total income of a person, the total income for the purpose of income-tax is computed on the basis of income classified under the different heads mentioned in section 6 of the Act, whereas super-tax is not concerned with the different heads, but is payable on the total income so ascertained ; and

(ii) while super-tax, except in a few cases, is payable by the assessee direct, the income-tax is payable by him direct as well as by deduction. While in the case of income-tax by reversing the process the tax attributable to a particular source can be ascertained, in the case of super-tax no such process is possible as the said liability springs into legal existence only after the total income is ascertained. The only possible method by which the said tax may be split up is by working out the proportion of the tax payable by the assessee in respect of an income from a particular source on the basis of the ratio the said income bears to the total income. But this method is not sanctioned by the Act. It is not legally possible to predicate what particular part of the super-tax is attributable to an income from a particular source, for unlike in the case of income-tax, total income alone is the criterion and the income from different sources is not relevant. To illustrate : super-tax is now levied on income over certain level—at present Rs. 25,000. If A's total income is Rs. 35,000 made up of Rs. 20,000 from big forest and Rs. 15,000 from other sources, what is the super-tax attributable to the income from the big forest ? The answer is, it is not possible to do so.

With this background let us give a close look to the provisions of rule 2 (2) (c) of the Schedule I to the Act. The legislative intention is manifest from the express language used and also by internal evidence. With the knowledge that under the Income-tax Act two separate duties, namely, income-tax and super-tax, are imposed, the Legislature has used the expression "income-tax". If the intention was to refer to both the taxes, it would have stated "income-tax and super-tax". The mention of the one and the omission of the other is a sure indication of its intention.

The qualification that income-tax paid should have been in respect of the income received from the big forest necessarily excludes super-tax, for under the Income-tax Act no super-tax is payable in respect of the income received from big forest, but only in respect of the total income. As we have pointed out earlier, it is not legally possible to disintegrate and allocate a portion of the super-tax to the income attributable to the big forest. It is not paid in respect of the income from the big forest, but is paid only in respect of the total income. If the contention of the appellant prevails, though the income from big forest falls below the taxable income, it will be deducted if, in combination with the income from other sources, the income goes up to the taxable level. In that event super-tax not payable in respect of the income from big forest will have to be deducted. That apart, the Rules made under the Act do not provide for any machinery for allocating the super-tax payable on the total income among the different sources. It is said that the same difficulties are present even in the case of income-tax. Though income-tax is also a tax on the total income of an assessee, the Act, as we have indicated earlier, provides for computing the income under different heads and, therefore, it is not inappropriate to describe a particular tax as attributable to an income from a particular head, but it would wholly be inappropriate to describe that a part of the super-tax is payable in respect of an income from a particular source.

The argument of Mr. Rajagopal Sastri, learned Counsel for the respondent, that the 30 years mentioned in the rule takes us back to a period when there was no super-tax appears to be not sound, for, as we have stated earlier, super-tax was payable in one form or other from the year 1917. That apart, if the income-tax takes in super-tax, the non-existence of super-tax in a particular year does not make any difference in ascertaining the average, for the income-tax for that year will be the income-tax without the addition of super-tax. This circumstance is not, therefore, of much relevance and we exclude it from our consideration.

The argument that if the Legislature intended not to exclude super-tax from the gross-income, it would have expressly stated so in the rule is an attempt to put the shoe in the wrong foot. The proper approach, particularly in the case of an expropriatory statute, is to ask the question why the Legislature did not expressly mention super-tax, if it intended to do so. The use of one of the two well-understood expressions is, on the other hand, an indication that the Legislature provided for the deduction of the one used and not of the other omitted. The reason for the

rule, if it is legitimate to speculate, appears to be that as it is concerned with the calculation of the net income from the estate after making certain deductions, only those deductions which have a direct relation to that income are allowed. If the other construction prevails, speculation would take the place of certainty and super-tax not paid factually in respect of the income from big forest would have to be deducted. Such a construction defeats the purpose of the rule.

Some of the decisions cited at the Bar may now be noticed. Lord Sumner pithily remarks in *Brooks v. The Commissioner of Inland Revenue*¹ :

".....for super-tax is another and a new tax nonetheless, though it is an additional duty of 'Income-tax'."

In *Bates*, *In re : Selmes v. Bates*², a testator gave to his wife by his will "such a sum in every year as after deduction of the income-tax for the time being payable in respect thereof will leave a clear sum of £2,000". It was held that the wife was entitled to the £2,000 free of income-tax only and was not entitled payment of any sum in respect of super-tax. There the trustees were directed to pay the annuity after deducting the income-tax in respect of that annuity. Rejecting the argument advanced on behalf of the wife that the said annuity should be free from super-tax also, Russell, J., observed :

"Now super-tax was not a charge in respect of any particular annuity or sum, but was a charge in respect of the recipient's whole income and was not a matter with which the trustees would be charged or concerned at all, and, in his opinion, what the testator had done was to give the widows the yearly sum of £2,500 clear of all deductions for which the trustees were accountable, but that did not include super-tax, which she must pay herself."

The learned Judge proceeded to state :

"No super-tax is really payable in respect of this sum."

It is true that the said judgment turned upon the provisions of a particular will, but the reasoning is helpful. There, income-tax was deductible in respect of sum bequeathed, here income-tax is deductible in respect of the income received from big forest. As super-tax is not a charge in respect of income from big forest, on the parity of reasoning it shall be held that the word "Income-tax" used in clause (c) of rule (2) of Schedule I to the Act excludes super-tax. In *Reckitt*, *In re : Reckitt v. Reckitt*³, a fund was bequeathed to trustees upon trust for investment and to pay out of the income of the investments "the annual sum of £5,000 free of income-tax" during the life of the annuitant. The Court of Appeal held that the annuitant was entitled to have the sum paid to her without deduction on account of super-tax and that the trustees must pay the super-tax payable in respect of that sum out of the income of the fund. The conclusion turned upon the provisions of the will. Lord Hanworth, M.R., distinguished the decision in *Bates*, *In re : Selmes v. Bates*² on the ground that Russell, J., founded his judgment upon the reference to deductions and also upon the direction to the trustees that specified sum should be paid after deduction of income-tax in respect thereof and proceeded to observe that in the case before them no reference was made to the system, or the power of the trustees to make deductions ; and that it was simply that a total sum in each year was to be paid free of income-tax. That decision may be right or wrong on the construction of the will before the Court of Appeal, but the features which distinguished *Bates's Case*², from the decision in *Reckitt's case*³, are also present in the case before us now. Here also the rule empowers the prescribed authority to deduct from the gross income-tax paid in respect of the income received from big forest. The earlier decision is more in point to the present case than the later. Be that as it may, the English decisions on the construction of the will are not of much help in construing the express provisions of rule 2 (2) (c) of Schedule I to the Act ; they shall be construed on their own terms. Having regard to the terms of the rule, we have come to the conclusion that income-tax does not take in super-tax.

In the result, the appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

1. (1914) 7 T.C. 236, 258.

2. L.R. (1925) Ch.D. 157, 159, 160, 161.

3. (1933) I.T.R. 1 : L.R. (1932) 2 Ch. 144 ; 1932 All E.R. 961.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax, Madras

.. Appellant*

v.

Mir Mohammad Ali

.. Respondent.

The Aruna Mills, Ltd., Ahmedabad

.. Intervener.

Income-tax Act (XI of 1922), section 10 (2) (vii), second paragraph 1 (vi-a)—Depreciation allowance—Motor vehicle—Replacement of petrol engine by new diesel engine—Extra depreciation, whether allowable.

A bus owner and transport operator replaced the petrol engines in two of his buses, by new diesel engines, incurring an expenditure of Rs. 18,544. In the relevant income-tax assessment, he claimed, in addition to the normal depreciation, extra depreciation under the second paragraph of sections 10 (2) (vi) and 10 (2) (vi-a) of the Income-tax Act. This was disallowed by the Department and the Tribunal. But the High Court answered the Reference made under section 66 (1) in favour of the assessee. On appeal by the Department,

Held, (by majority) *Subba Rao and Sikri, JJ.*—The new diesel engines fitted in the motor vehicle would be machinery installed within the meaning of the expression in clauses (vi) and (vi-a) of section 10 (2) and extra depreciation is allowable on that score.

The word 'machinery' occurring in clauses (iv), (v), (vi) and (vi-a) must bear the same ordinary meaning of the word in all the clauses. It means "some mechanical contrivances which, by themselves or in combination with one or more other mechanical contrivances, by the combined movement and inter-dependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result."

A diesel engine is clearly machinery.

The expression 'installed' did not necessarily mean 'fixed in position' but was also used the sense of 'inducted or introduced', or 'to place an apparatus in position for service or use.'

Per Shah, J.—To be installed, the machinery being new must for the purpose of the business, brought into service as a self-contained unit. It would be difficult to regard introduction of a part, which has no independent use in the business conducted by the assessee, as machinery installed for the purpose of the second paragraph of clause (vi) of section 10 (2) of the Act.

That it may be capable of being used in another business by the same or another assessee as a self-contained unit is irrelevant in considering its admissibility for initial allowance in the business in which it is actually used.

The assessee will not be entitled to the claim of extra depreciation.

Appeal from the Judgment and Order dated 16th November, 1959, of the Madras High Court in Case Referred No. 82 of 1956.†

S. K. Kapur, Senior Advocate (*R. N. Sachthey*, Advocate, with him), Appellant.

S. Swaminathan and *R. Gopalakrishnan*, Advocates for Respondent.

S. T. Desai, Senior Advocate (*J. B. Dadachanji*, *O. C. Mathur* and *Ravindra Narain*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Intervener.

The Court delivered the following Judgments

Sikri, J.—(for *K. Subba Rao, J.* and himself).—This is an appeal by the Commissioner of Income-tax, Madras, against the Judgment of the High Court, dated November 16, 1959, on a certificate granted by the High Court under section 66-A of the Indian Income-tax Act, 1922.

The respondent, Mir Mohd. Ali hereinafter referred to as the assessee, is a bus owner and transport operator at Vellore, North Arcot District. He had a fleet of buses, and during the year of account ending with March 31, 1950, (relevant to assessment year 1950-51) he replaced the petrol engines in two of his buses (MDJ 583 and MDJ 723) by new diesel engines, incurring an expenditure of Rs. 18,544 in this connection. Before the Income-tax Officer, apart from claiming normal depreciation under the first paragraph of clause (vi) of section 10 (2), he also claimed depreciation under the second paragraph of clause (vi) and clause (vi-a) of the Indian Income-tax Act, 1922. The Income-tax Officer allowed only 25%

depreciation under the first paragraph of clause (vi). The assessee appealed unsuccessfully to the Appellate Assistant Commissioner on this point. There were other points involved in the appeal but as we are not concerned with them in this appeal, they are not being mentioned. On further appeal, the Appellate Tribunal held that

"the assessee is not entitled to extra depreciation under section 10 (2) (vi) or section 10 (2) (vi-a) because however important the engine might be for running of a motor, it is after all part of an equipment and it cannot by itself become "machinery" for the purpose of claiming extra depreciation, as envisaged in these sub-sections. We have to hold that the installation of the new engines is only a capital addition. For the above reasons the assessee was rightly refused the extra depreciation he claims."

The Income-tax Appellate Tribunal, on the application of the assessee, referred the following question to the High Court :

"Whether extra depreciation is admissible under the provisions of section 10 (2) (vi-a) of the Income-tax Act, in respect of a diesel oil engine fitted to a motor vehicle in replacement of the existing engine ?"

We may mention that another question regarding disallowance of interest had also been referred to the High Court but we are not concerned with that in the present appeal.

As the High Court felt that there had been an accidental slip in framing the question, it amended the question and the amended question reads :

"Whether extra depreciation is admissible under the provisions of section 10 (2) (vi) and section 10 (2) (vi-a) of the Income-tax Act in respect of the diesel oil engines fitted to the motor vehicles in replacement of the existing engines ?"

The High Court answered this question in the affirmative, *i.e.*, in favour of the assessee. The Commissioner of Income-tax, on obtaining a certificate under section 66-A (2) of the Income-tax Act, has filed this appeal.

Before attempting to answer the question, it is necessary to set out the relevant provisions of the Income-tax Act. The relevant provisions, as in force at the relevant time, were :

"Section 10 (2). Such profits or gains shall be computed after making the following allowances, namely :—

.....

.....

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid ;

(v) in respect of current repairs to such buildings, machinery, plant or furniture, the amount paid on account thereof ;

(vi) in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent where the assets are ships other than ships ordinarily plying on inland waters to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed ;

and where the buildings have been newly erected, or the machinery or plant being new has been installed, after the 31st day of March, 1945, a further sum (which shall however not be deductible in determining the written down value for the purposes of this clause) in respect of the year of erection or installation equivalent :—

(a) in the case of buildings the erection of which is begun and completed between the 1st day of April, 1946 and the 31st day of March, 1952 (both dates inclusive), to fifteen per cent of the cost thereof to the assessee ;

(b) in the case of other buildings, to ten per cent of the cost thereof to the assessee ;

(c) in the case of machinery or plant, to twenty per cent of the cost thereof to the assessee :

Provided that—

.....

.....

(vi-a) in respect of depreciation of buildings newly erected, or of machinery or plant being new which has been installed, after the 31st day of March, 1948, a further sum (which shall be de-

ductible in determining the written down value) equal to the amount admissible under clause (vi) (exclusive of the extra allowance for double or multiple shift working of the machinery or plant and the initial depreciation allowance admissible under that clause for the first year of erection of the building or the installation of the machinery or plant) in the assessments for each of the five years commencing on the 1st day of April, 1949, and ending with the 31st day of March, 1954 :

Provided that where, in respect of such machinery or plant, the assessee establishes that the market value of similar machinery or plant on the 31st day of March, 1953, is lower than the original cost, then, subject to the provisions of clause (vi), there shall be made in the assessment for the year commencing next after that date a further allowance (which shall be deductible in determining the written down value) of an amount by which the written down value of the machinery or plant as on that date (without deduction of the initial depreciation admissible in the first year) would have exceeded the corresponding written down value thereof as on the same date if the market price of the machinery or plant had been taken as the actual cost of the assessee ;

(vii) in respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold or its scrap value :

Provided that.....

(5) In sub-section (2) 'plant' includes vehicles, books, scientific apparatus and surgical equipment purchased for the purpose of the business, profession or vocation....."

The point at issue before us has been considered by three High Courts. The Bombay and Andhra Pradesh High Courts have held against the assessee while in the judgment under appeal, the Madras High Court has held in favour of the assessee. The High Court of Andhra Pradesh, in the case of *B. Srikantiah v. Commissioner of Income-tax, Andhra Pradesh*¹, followed the Bombay case and expressly dissented from the Madras case.

In the judgment under appeal (reported as *Mir Mohd. Ali v. Commissioner of Income-tax, Madras*)², the High Court arrived at the conclusion by the following steps :

(a) Machinery must be given the same meaning with reference to each of the statutory provisions, in section 10 (2) (vi) and section 10 (2) (vi-a) ;

(b) A diesel engine is machinery by the test laid down in the case of *Corporation of Calcutta v. Chairman, Cossipore and Chitpore Municipality*³ ;

(c) Machinery does not cease to be machinery merely because it has to be used in conjunction with one or more machines. Nor does it cease to be machinery merely because it is, for instance, installed as part of a manufacturing or industrial plant ;

(d) The statutory provision for depreciation is in the alternative. Whether it is plant or whether it is machinery without its being itself a plant, the assessee is entitled to claim the statutory allowance for depreciation.

The question then is : Which is the correct view ? First, the history of paragraph two of clause (vi) may be noticed. The object of the Income-tax (Amendment) Act, 1946 (VIII of 1946), which first inserted the provisions regarding extra depreciation, was to encourage the modernisation and rehabilitation of industry and trade. The Second World War had ended recently and during the long war, machinery and plant had not only not been replaced or modernised but had been subjected to excessive wear and tear and needed rehabilitation. During the War, there had also been great advance in technology.

It is then pertinent to point out that the word 'machinery' occurs in clauses (iv), (v), (vi) and (vi-a) of section 10 (2). *Prima facie* the same meaning must be given to the word 'machinery' in all these clauses. If a machine is machinery for purposes of giving an allowance in respect of insurance or for repairs or in respect of normal depreciation or for the purpose of paragraph one of clause (vi), it must also be machinery for the purpose of second paragraph of clause (vi) and clause (vi-a).

But it is said that the scheme of paragraph two of clause (vi) and clause (vi-a) is different from that of paragraph one of clause (vi) inasmuch as before it can qualify for extra depreciation, the machinery must be new and must be installed, and the rate of depreciation is provided in the Act itself. Keeping in view this scheme, it is urged

1. (1961) 1 An.W.R. 78 : A.I.R. 1961 A.P. 318. 3. L.R. (1922) 48 I.A. 435 : I.L.R. 49 Cal 2. (1960) 2 M.L.J. 460. 190 (P.C.)

that the word 'machinery' must be given a restricted meaning in paragraph two of clause (vi) and clause (vi-a), and the meaning suggested is that it must be a "self-contained unit capable of being put to use in the business, profession or vocation for the benefit of which it was installed". That this is the true meaning, it is further said, is evidenced by the definition of the word 'plant' in section 10 (5). It is argued that this definition indicates that for purposes of paragraph two of clause (vi) and clause (vi-a), 'plant,' including a vehicle, should be viewed as a unit and component parts thereof are excluded from its purview, and 'machinery' should also be considered in the same light.

Let us now examine these contentions. First, we do not think that there is anything in the scheme of the second paragraph of clause (vi) and clause (vi-a) that throws any light on the construction of the word 'machinery' in these clauses. It is true that the machinery must be new and it must be installed and the rate of allowance is prescribed in the Act itself. But the requirement that the machinery must be new does not tell us what is 'machinery'. Assuming for the present that a diesel engine is machinery, if an assessee buys and installs a second-hand diesel engine, he will not be given the extra allowance under the second paragraph of clause (vi), and the ground, would be that the engine is not new and not that because it is second-hand, it is not machinery. Similarly, if it is purchased but not installed, the ground of refusal would be that it has not been installed and not that because it has not been installed it has ceased to be machinery. Suppose a new machinery is purchased but not installed, it would not qualify for extra depreciation on the ground that it has not been installed and not because it has ceased to be machinery due to its non-installation. The fact that the rate of depreciation is provided for in the Act has also no bearing on the question of the construction of the word 'machinery'. This fact only indicates that the Legislature had made up its mind as to the extent of encouragement to be given to industry and, therefore, it did not consider it necessary to delegate this to the rule-making authority.

The definition of the word 'plant' in section 10 (5) equally does not throw any light on the meaning of the word 'machinery'. The word 'plant' is of wide import but even so it may be argued that vehicles, books, scientific apparatus and surgical equipment are not 'plant' in all businesses, professions and vocations. The Legislature settled this possible controversy, but without throwing any light on the true meaning of the word 'machinery'.

What then is the test for determining whether a mechanical contrivance is machinery for the purposes of second paragraph of clause (vi) and clause (vi-a)? The Privy Council in the case of *Corporation of Calcutta v. Chairman, Cossipore and Chitpore Municipality*¹, hazarded the following definition of 'machinery'.

"The word 'machinery' when used in ordinary language *prima facie*, means some mechanical contrivances which, by themselves or in combination with one or more than one other mechanical contrivances, by the combined movement and inter-dependent operation of their respective parts generate power, or evoke, modify apply or direct natural forces with the object in each case of effecting so definite and specific a result."

They had already observed that the word 'machinery' must mean more than a collection of ordinary tools. The Privy Council case was not a tax case but *prima facie*, the ordinary meaning of the word 'machinery'—and the word 'machinery' is an ordinary and not a technical word—must, unless there is something in the context, prevail in the Indian Income-tax Act also.

According to the above definition, a diesel engine is clearly 'machinery'. Indeed, rule 8 of the Income-tax Rules treats aero-engines separately from aircraft. It is true that this rule cannot be used to interpret the clauses in the Act but it does show that components of an aircraft, which are machinery, can be treated separately.

Further, when the assessee purchased the diesel engines, they were not 'plant' or part of a plant; because they had not been installed in any vehicle. They were, according to the definition given by the Privy Council, machinery. They were not

yet part of a plant and, according to the Act, 20% of the cost thereof was allowable to the assessee. All the conditions required by the Act are satisfied. If we look at the point of time of purchase and installation, what was purchased and installed was machinery.

The learned Counsel next contended that the assessee is not entitled to extra depreciation because a diesel engine cannot be said to be installed. He urges that the word 'installed' is wholly inappropriate to cover the fixing of a diesel engine in a motor vehicle. We are of the opinion that there is no force in this contention. As observed by the Bombay High Court in the case of *Commissioner of Income-tax v. Saraspur Mills, Ltd.*¹, the expression 'installed' did not necessarily mean fixed in position but was also used in the sense of 'inducted or introduced'; or to use the language of the Madras High Court in the case of *Commissioner of Income-tax, Madras v. Sri Ram Vilas Services, Pvt., Ltd.*², installed would certainly mean to place an apparatus in position for service or use. We are of the opinion that when an engine is fixed in a vehicle it is installed within the meaning of the expression in clauses (vi) and (vi-a).

Accordingly, we hold that the High Court was correct in answering the question referred to it in the affirmative. The appeal, therefore, fails and is dismissed with costs.

Shah, J.—I am unable to hold that the respondent is entitled to the allowance under section 10 (2) (vi), paragraph 2, in respect of the diesel engines claimed by him.

Section 10 of the Indian Income-tax Act provides that tax shall be payable on the profits and gain of assessee under the head "profits and gain of business, profession or vocation". By sub-section (2) in the computation of taxable profits certain allowances prescribed therein are permissible. We are primarily concerned in this appeal with the initial allowance permissible under the second paragraph of clause (vi) of sub-section (2). But clauses (iv), (v), (vi), (vi-a) and (vii) are inter-related and it may be necessary briefly to refer to those provisions. By clause (iv) allowance for premium paid in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation is admissible. Under clause (v) an amount paid on account of any current repairs to *such* buildings, machinery, plant or furniture is an admissible allowance. Clause (vi) recognises by the first paragraph a right to normal depreciation of a percentage on the prescribed valuation of *such* buildings, machinery, plant or furniture, which are the property of the assessee. The second paragraph at the material time stood as follows:

"and where the buildings have been newly erected, or the machinery or plant being new has been installed, after the 31st day of March, 1945, a further sum (which shall however not be deductible in determining the written down value for the purposes of this clause) in respect of the year of erection or installation equivalent, etc., etc."

Clause (vi-a) which was inserted by Act LXVII of 1949 permitted a further depreciation allowance in respect of buildings newly erected or of machinery or plant being new which had been erected or installed after March 31, 1948, in not more than five successive assessments, for the financial year next following the previous year in which such buildings were erected, or machinery or plant installed. Clause (vii) permitted as an allowance the difference between the written down value and the sale price or scrap value of such buildings, machinery or plant which had been sold, discarded, demolished or destroyed.

All these clauses dealt with allowances in respect of assets of the specified description and used for the purpose of business, profession or vocation. The depreciation allowance permitted under the first paragraph of clause (vi) which may be called the normal allowance is in respect of all buildings, machinery, plant and furniture

1. A.I.R. 1960 Bom. 218 : I.L.R. (1960) Bom. 21. 2. (1960) 1 M.L.J. 325 : I.L.R. (1960) Mad. 355.

of the assessee used for the purpose of his business. By the second paragraph of clause (vi) an initial allowance in the year in which buildings have been newly erected or the machinery or plant being new has been installed after March 31, 1945, is allowable. Use of the definite article "the" in the second paragraph indicates that the buildings, machinery or plant referred to in that paragraph must also be used for the purpose of the business, profession or vocation of the assessee. However to qualify for the initial allowance under paragraph two, the buildings must be newly erected or the machinery or plant being new must have been installed after March 31, 1945.

The rival views are pressed upon us in support of the respective cases of the Commissioner and the assessee as to the meaning of the second paragraph. The Commissioner contends that the building, machinery or plant for which the initial allowance is admissible must be a self-contained unit capable of being put to use in the business, profession or vocation for the benefit of which it is erected or installed. It is submitted that the second paragraph of clause (vi) was enacted with the object of giving a fillip to industry which had been starved during the war years of new machinery and building activity. But the building, machinery, or plant to qualify for the initial allowance were not intended to be in the nature of replacement, addition, or repair to existing units : they had to be buildings newly erected or machinery or plant being newly installed. On behalf of the assessee it was contended that the Legislature has not put any restriction of the nature suggested on behalf of the Commissioner and, therefore, any building or a part thereof newly erected or any new machinery or plant or a part thereof installed, qualified for the benefit of the initial allowance.

The question to be decided is one about the intention of the Legislature. Can it be said that when to an existing building a room or even a floor is added that the additional construction is a building newly erected ? In my view, that does not appear to be the intention. Such an addition to an existing structure, becomes a part of the structure, and cannot be said to be a building newly erected. If every alteration or addition in an existing building is covered by the second paragraph of clause (vi) mere repairs falling within the words of clause (vi) may also qualify for initial allowance. If a mere addition to a building cannot be regarded as such an erection as is contemplated by the second paragraph of clause (vi), it would be difficult to hold that the machinery or plant would include part of machinery or plant.

Counsel for the assessee concedes that replacement of a petrol engine by a diesel engine in a motor transport vehicle is not installation of plant. The question is whether it is installation of machine. In my view replacement of a petrol engine by a new diesel engine in a motor car cannot be said to be installation of machinery within the meaning of the relevant clause. To be installed, the machinery being new must for the purpose of the business be brought into service as a self-contained unit. If the argument of the assessee is sound, every bolt, nut, rod or flywheel which constitute a part of machinery would qualify for the initial allowance and the difference between the allowance for repairs and initial allowance may be obliterated. Counsel for the assessee also did not, as I understood him, contend that replacement of a mere part of machinery was installation of machinery within the meaning of the second paragraph of clause (vi). The Legislature has not given any definition for that expression, and the expression "machinery" is otherwise somewhat difficult to define. The Judicial Committee in *Corporation of Calcutta v. Cossipore and Chitpore Municipality*¹, when it was called upon to consider whether a tank supported on columns, and which could be filled by pumping from a reservoir belonging to the Corporation could be regarded as machinery within the meaning of the Bengal Municipal Act, 1884, observed at page 445 :

"If their Lordships were obliged to run the hazard of the attempt (to define machinery) they would be inclined to say that the word 'machinery' when used in ordinary language, *prima facie*

1. (1922) L.R. 48 I.A. 435: I.L.R. 49 Cal. 190.

means some mechanical contrivances which, by themselves or in combination with one or more other mechanical contrivance, by the combined movement and inter-dependent operation of their respective parts generate power, or evoke, modify, apply or direct natural forces with the object in each case of effecting so definite and specific a result."

But we are not called upon in this case to decide whether a diesel engine is in the abstract machinery. The question is whether a diesel engine, which is used for replacing a petrol engine, in a vehicle used by a transport operator for the purpose of his business is machinery installed within the meaning of section 10(2)(vi), paragraph 2. Whether "machinery" is some contrivance for supplying motive power to another contrivance which directly produces an article or is a mechanical contrivance which produces or assists in the production of an article it would be difficult to regard introduction of a mere part, which has no independent use in the business conducted by the assessee, as machinery installed for the purpose of the second paragraph of clause (vi). The Legislature has provided for the normal depreciation by paragraph 1 of clause (vi) and in respect of newly installed machinery it has provided for the initial allowance, the object being to induce industrialists to start new industries or to extend their existing industries by erecting new buildings, or installing new machinery or plant.

A diesel engine by itself may undoubtedly be used in a business other than that of a transport operator, for instance, for working a pump to draw underground water and may for that purpose be regarded as a self-contained unit. But that is not decisive of the question whether in the business of a transport operator a diesel engine used to replace a petrol engine may be regarded as machinery installed. Machinery installed within the meaning of paragraph 2 of section 10 (2) (vi) is qualified by the expression "used for the purposes of the business", and therefore unless as a self-contained unit the machinery is used for the purposes of the business initial depreciation would not be admissible in respect thereof. That it may be capable of being used in another business by the same or another assessee as a self-contained unit is irrelevant in considering its admissibility for initial allowance in the business in which it is actually used.

It would be fruitless to refer to the schedule under rule 8 of the Income-tax Rules for computing the allowance in respect of the depreciation under section 10 (2) (vi). The schedule catalogues different items in respect of which depreciation is admissible at the rates prescribed. But whether a particular item is admissible for initial allowance in the second paragraph must depend upon two factors: (i) that it is in respect of the year of erection or installation that the initial allowance is permissible; and (ii) the building or the machinery is used for the purposes of the business. If it is a predicate of admissibility to initial allowance that the machinery must be new and a self-contained unit in the particular business in the carrying on of which the initial allowance is claimed, the fact that in certain conditions that machinery may be regarded as self-contained for the purpose of another business in which it is used, would furnish no guide in ascertaining whether initial allowance is permissible as a deduction in the assessment of taxable income of the business in which it is actually used.

In my view the appeal should be allowed and the question referred for opinion should be answered in the negative.

Order of the Court :—In accordance with the opinion of the majority the appeal is dismissed.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax, Bihar and Orissa, Patna

.. Appellant*

v.

Rani Bhuwaneshwari Kuer

.. Respondent.

Income-tax Act (XI of 1922), section 16 (1) (c), Third Proviso—Transfer of assets—Trust for discharge of settlor's debts—Income thereafter to be for benefit of settlor and others—Trust not revocable for more than six years—No benefit to settlor out of income of other beneficiaries—Whether to be added to settlor's own income.

The assessee, with a view to liquidate her debts, conveyed to certain trustees, her properties which after discharge of the debts, were to be held in trust for her self, her husband and her sons. The assessee by a subsequent instrument clarified that the deed of trust was irrevocable for a period which, on reckoning, was more than six years. The settlor had no direct or indirect benefit in the rest of the income of the trust which was received by the other beneficiaries. For the assessment year 1947-48 the Department included the entire income from the trust in the settlor's total income. The Tribunal in appeal applied the Third Proviso to section 16 (1) (c) of the Indian Income-tax Act, 1922, and directed the deletion of the entire income from the assets transferred. The High Court, on Reference by the Department confirmed the order of the Tribunal holding that the entire income was not taxable in the hands of the assessee by virtue of the Third Proviso to the section so long as the power of revocation was not exercised by the assessee and also held that the assessee was liable to tax on the income received by herself from the trust. On appeal, by the Departments by Special Leave,

Held, that by virtue of the Third Proviso to section 16 (1) (c) of the Act, the income received by the beneficiaries under the deed of trust other than the assessee could not, until the power of revocation arose to the assessee, be deemed to be the income of the assessee for the purpose of assessment to income-tax.

The conditions necessary for the application of the Third proviso to the section are ; that the trust should not be revocable for a period exceeding six years or during the lifetime of the beneficiary and that the settlor or disponent should have no direct or indirect benefit from the income given to the beneficiary.

The scheme of the section is that where there is a revocable transfer of assets, the income derived from such assets is still to be considered the income of the settlor. The first proviso to section 16 (1) (c) is explanatory and specifies what would be deemed a revocable transfer in spite of the deed being described as irrevocable. The second proviso explains the meaning of the expression 'settlement' or 'disposition.' If the deed is held to be revocable under the first Proviso the Third Proviso still saves the income from being assessed in the hands of settlor if the deed is not revocable for a period exceeding six years and if the settlor derived no direct or indirect benefit from the income of the settlement.

The proviso does not operate to exclude the income which the settlor receives as a beneficiary from liability to income-tax, it merely excludes that part of the income which is under the deed of settlement given to another person from liability to tax in the hands of the settlor, if the condition prescribed by the Third Proviso are fulfilled.

Appeal by Special Leave from the Judgment and Decree dated 9th May, 1961, of the Patna High Court, in M.J.C. No. 497 of 1957.

N. D. Karkhanis and *R. N. Sachlthey*, Advocates, for Appellant.

Sarjoo Prasad, Senior Advocate, (*B. D. Singh* and *D. Goburdhan*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—Rani Bhuwaneshwari Kuer—hereinafter referred to as 'the assessee' was the proprietor of a seven-sixteenth share in an estate known as 'Tekari Raj', having inherited that estate from her parents. The assessee later acquired by purchase a major portion of the remaining nine-sixteenth share in the Raj. The estate held by the assessee was heavily encumbered, and, with a view to arrange for liquidation of the debts, the assessee executed an indenture of trust dated 20th January, 1941, whereby the Tekari Raj and certain zamindari properties owned by the assessee were conveyed to certain named trustees to be held in trust, subject to conditions

specified therein. The principal beneficiaries under the deed after payment of the debts were the assessee, her husband and her five sons.

By the 23rd clause of the deed it was directed that after making certain payments, the trustees shall divide the surplus of the net rents, issues and profits thereof in the proportions set out in the clause. The 24th and the 25th clauses dealt with the devolution of the beneficial interest in the event of death of any of the beneficiaries. By the 41st clause it was provided that after the debts and liabilities set out in Schedule 'D' to the deed were paid off and discharged, the settlor shall be entitled to make a permanent trust of some of the villages demised under the deed for the maintenance and upkeep of the Tekari Forts, observance of Durga Puja and other purposes specified therein, and in the event of the settlor dying before payment and discharge of the debts and liabilities set out in Schedule 'D' and without making any permanent trust for the purposes enumerated, the settlor enjoined the trustees after discharge of the debts mentioned in Schedule 'D' to set apart property fetching a net income of Rs. 20,000 to form the corpus of the permanent trust to meet the expenses relating to the repair of the Tekari Forts, celebration of Durga Puja and other purposes specified. By the 42nd clause it was provided that trust under the deed shall terminate after payment of the debts and liabilities set out in Schedule 'D' or after the death of the last amongst the sons, whichever event shall last occur, and by the 43rd clause it was provided if any of the beneficiaries under the deed or their heirs in future shall challenge the Indenture of Release and Agreement dated 6th December, 1939, executed by the settlor in favour of her husband and the action taken thereunder, the said beneficiary shall on making such objection forfeit his right as a beneficiary under the deed. It was also provided that if there shall be any breach by any of the beneficiaries or of the covenants or conditions and limitations imposed under the deed, he or she shall not be entitled to any money or to any share in the rents, issues or usufruct of the trust property and he or she shall be deemed to have been excluded from the categories of beneficiaries and his or her share of the rents, issues and profits will be dealt with or enjoyed by the settlor in her entire discretion, provided always that the settlor may at any time during her life by any deed revocable or irrevocable revoke or vary either wholly or partly the trust or any provisions of the deed, but not before the payment and discharge of the debts and liabilities as mentioned in Schedule 'D', and provided further that notwithstanding such revocation of the trust the settlement made under the deed remained good and effective subject to the forfeiture clause set out therein.

This deed was modified by a deed of rectification dated 22nd December, 1941, reciting that with the consent of all persons who were parties to the deed of trust, it was directed that at any time during the lifetime of the assessee, the assessee had the power to revoke or vary, either wholly or partly, the trust or any provisions of the deed of trust, but not so as to affect the payment and discharge of the debts and liabilities as mentioned in Schedule 'D' thereto and the original deed of trust shall be read and construed as if it contained a power vested in the settlor (the assessee) during her life by deed to revoke or vary, either wholly or partly, the trust or any provisions of the said trust, but not so as to affect the payment and discharge of the debts and liabilities as mentioned in Schedule 'D'.

Another deed called a deed of amendment was executed by the assessee on 12th January, 1942. By this deed paragraphs 22, 32, 33, 35, 36 and 37 of the original deed were cancelled and other paragraphs including paragraphs 23, 24 and 42 were amended and modified and paragraphs 42 (a), 44 and 45 were added. By the amendment of paragraph 23 the surplus rents, issues and profits of the trust property were to be divided in seven equal shares and by the amendment made in clause 24 it was provided that in the event of the death of any of the sons, his share of the rents, issues and profits shall become payable to his heir or heirs. By the modification in paragraph 42 it was provided that the trust under the deed may terminate after payment of the debts and liabilities of the trust that would then be outstanding or after extinguishment of the Thicca leases in favour of the Maharajadhiraj of Darbhanga or in favour of Capt. Maharaj Kumar Gopal Saran Narain Singh of

Tekari, whichever event shall occur last. Paragraph 42 (a) provided that after the provisions as laid down in paragraph 41 had been carried out and when the last contingency set out in paragraph 42 as modified had arisen, the beneficiaries or the heirs or successors-in-interest or representatives-in-interest of such of them as had acquired any right from any of the beneficiaries under the deed shall be entitled to partition the trust property according to their shares. The material part of paragraph 45 provided :

"That the settlement made under these presents shall be permanent, unalterable and irrevocable so far as the interest created under these presents are concerned, but each beneficiary shall have full right to make any sort of arrangement about devolution or succession or make such alienation as he may think fit, about his share, but the trust created under these presents shall be irrevocable, so long as the debts mentioned above including all the liabilities on the Trust property up to date are not fully paid up or discharged or so long as the Thicca leases in favour of Hon'ble Maharajadhiraj of Darbhanga or Capt. Maharaj Kumar Gopal Saran Narain Singh remain good and effective whichever event shall happen last.

Provided that always paragraph 43 of the Indenture of Trust dated 20th January, 1941, shall henceforth be read subject to this paragraph.

* * * * *

In proceedings for assessment for the assessment year 1947-48 the Income-tax Officer, Gaya,—Palamau Circle, Gaya, rejected the contention raised by the assessee that the income under the trust was taxable in the hands of the trustees under the deed of settlement and applying the provisions of section 16 (1) (c) of the Indian Income-tax Act, 1922, brought the income of the trust to tax as part of the assessee's income. The order passed by the Income-tax Officer was confirmed in appeal to the Appellate Assistant Commissioner, but the Income-tax Appellate Tribunal reversed that order. The Tribunal observed that

"revocation involved taking back that which was given once, but in the present case there was nothing done by the assessee by which it could be said that she had taken back what she had given by the original deed of trust,"

and the trust was therefore not a revocable trust as contemplated by section 16 (1) (c) of the Income-tax Act.

The High Court of Judicature at Patna directed the Income-tax Appellate Tribunal under section 66 (2) of the Act to state a case and to refer the following questions :

(1) Whether the trust created by the assessee is a revocable trust within the meaning of section 16 (1) (c) of the Income-tax Act ?

(2) Whether the income from the property which is the subject-matter of the settlement mentioned in question (1) can be deemed to be the income of the assessee under section 16 (1) (c) of the Income-tax Act ?

The High Court held that the deed of trust dated 20th January, 1941 (as modified by the subsequent deed dated 12th January, 1942) was within the meaning of section 16 (1) (c) of the Income-tax Act a revocable trust, but not being revocable for six years from the date of its creation, by virtue of the third proviso to section 16 (1) (c) which controlled not merely the substantive provisions of section 16 (1) (c) but the first proviso to that section as well, the income received by the beneficiaries (other than the settlor) under the deed of trust was not liable to be included in the income of the assessee. The High Court accordingly directed that the income of the trust property which is the subject-matter of the settlement of the trust, was not liable to be assessed to tax under the third proviso to section (1) (c), but only so long as the power of revocation granted by the deed was not exercised by the assessee under the terms of the deed of trust. The High Court also declared that the assessee was liable to pay tax on the income received by her in the character of a beneficiary out of the trust properties.

Against the order passed by the High Court, with Special Leave, the Commissioner of Income-tax, Patna, has appealed to this Court.

The principal question which falls to be determined in this appeal is whether by the third proviso to clause (c) of section 16 (1), income received by the beneficiaries other than the assessee is income arising to them by virtue of a settlement

which is not revocable for a period exceeding six years, and from which income the assessee derives no benefit direct or indirect. Section 16 (1) (c) provides :—

“(1) In computing the total income of an assessee—

- (a) * * * * *
- (b) * * * * *

(c) all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of Indian Income-tax (Amendment) Act, 1939 (VII of 1939), from assets remaining the property of the settlor or disposer, shall be deemed to be income of the settlor or disposer, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor :

Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provisions for the retransfer directly or indirectly of the income or assets to the settlor, disposer or transferor or in any way gives the settlor, disposer or transferor a right to reassume power directly or indirectly over the income or assets :

Provided further that the expression “settlement or disposition” shall for the purpose of this clause include any disposition, trust, covenant, agreement, or arrangement, and the expression “settlor or disposer” in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made :

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disposer derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him.”

The High Court held that the deed of trust was one in which the assets remained the property of the settlor, but as the trust was not revocable for a period of six years, the income received by the beneficiaries (other than the assessee) was not liable to be taxed as the assessee's income till the power to revoke arose in his favour.

The point in dispute in this appeal is about the applicability of the third proviso to section 16 (1) (c), which seeks to exempt from the operation of the principal clause income which arises to any person under the deed of settlement executed by the assessee. Two conditions are necessary for the application of the third proviso—(i) that the trust should not be revocable for a period exceeding six years or during the lifetime of the beneficiary and (ii) the settlor or disposer should have no direct or indirect benefit from the income given to the beneficiary.

Counsel for the Commissioner contended in the first instance that the third proviso to section 16 (1) (c) applied to the trust created by the assessee because in fact within six years of the date of its execution the deed was revoked, and that in any event on a true interpretation of the covenants of the deed of trust it was revocable within six years. The plea that the trust was in fact revoked within six years was never raised before the Revenue Authorities, the Tribunal or even the High Court, and is plainly unsustainable. There are, it is true, certain recitals made in the deed dated 18th September, 1946, executed by the assessee, which is styled “Deed for further alteration of terms and constitution of trust” by the assessee, that the liabilities referred to in Schedule ‘D’ to the deed of trust dated 20th January, 1941, had been fully discharged and the beneficiaries had been receiving the surplus rents, issues and profits according to their respective shares in the same and the settlor had by a deed of trust dated 28th May, 1946, conveyed and settled a portion of her seventh share in the rents, issues and profits of the trust properties, as well as in the corpus of Shri Bhubreshwari Hari Haresh Private Trust for meeting certain expenses. But those recitals do not even *prima facie* indicate that the trust was revoked at any time. We cannot therefore entertain this new ground for the first time in this Court.

It may be noticed that whereas under the original clause 43 of the deed of trust dated 20th January, 1941, even though the trust was expressly made revocable, it could not be revoked before payment of the debts and discharge of the liabilities mentioned in Schedule “D”. By the 45th clause which was added by the deed of amendment dated 12th January, 1942, the settlement made under the deed was declared permanent, unalterable and irrevocable so far as the interest created under the deed of amendment was concerned; and was also to stand irrevocable so long as the debts mentioned in Schedule ‘D’ and other liabilities of the trust including all the liabilities on the

trust properties were not fully paid up and discharged *and so long as the leases* in favour of the Maharajadhiraj of Darbhanga or Capt. Maharaj Kumar Gopal Saran Narain Singh remained good and effective, whichever event last happened. It is conceded that the lease in favour of the Maharajadhiraj of Darbhanga was to enure till 1965 and the lease in favour of Capt. Maharaj Kumar Gopal Saran Narain Singh till 1954. By clause 45 of the deed of amendment the right of revocation was not exercisable till the *Thicca* leases in favour of the Maharajadhiraj of Darbhanga and Capt. Maharaj Kumar Gopal Saran Narain Singh remained good and effective, and we are unable to hold that the deed of trust was revocable within six years as provided by section 16 (1) (c) of the Act.

It was urged on behalf of the Commissioner, in the alternative, that the third proviso to section 16 (1) (c) did not protect the assessee against the application of substantive part of that clause, because the assessee was deriving under the terms of the deed of trust a direct benefit. There are in the third proviso, two cumulative conditions on the existence of which the exemption from liability to have the income arising from a settlement included in the assessee's income depends. The effect of the two conditions is that, that part of the income which arises to any person by virtue of the settlement which is not revocable for a period of six years or which is not revocable during the lifetime of the beneficiary will not be included in the settlor's income, provided that from the income of such person the settlor derives no benefit direct or indirect. The third proviso to section 16 (1) (c) does not operate to exclude the income which the settlor receives as a beneficiary, from liability to income-tax; it merely excludes that part of the income which is under the deed of settlement given to another person from liability to tax in the hands of the settlor, if the conditions prescribed by the third proviso are fulfilled. The contention raised by the Commissioner that if under the deed of trust the settlor has reserved to himself as a beneficiary any part of the income of the property settled, the third proviso will not apply to the deed of trust runs contrary to the plain words of the statute. In terms, the third proviso excludes from the operation of the principal clause that *part of the income* alone which arises to any person under a deed of settlement; it does not remove from its protection the entire deed of trust, if part of the income is not covered by the conditions prescribed or if the settlor had, in a part of the income, interest direct or indirect.

Finally, it was contended that the third proviso only operates in respect of deeds of settlement or disposition which are referred to in clause (c), but not to deeds of settlement or disposition which by the first proviso are *deemed to be* revocable in the conditions mentioned by the first proviso. In other words, it is submitted, the benefit of the proviso is not available in those cases where the settlement or disposition is deemed by the proviso to be revocable, because it contains a provision for the retransfer directly or indirectly of the income or assets to the settlor, or in any way it gives the settlor, disponent or transferor a right to reassume power directly or indirectly over the income or assets. We are unable to agree with this contention also. By the first proviso, settlements, dispositions or transfers of the character described therein, are deemed revocable for the purpose of the principal clause. The function of the first proviso and the second proviso is plainly explanatory. The second proviso in terms says that the expression "settlement or disposition" is to include any disposition, trust, covenant, agreement, or arrangement, and the expression "settlor or disponent" is to include any person by whom the settlement or disposition was made. Similarly, the first proviso states that settlements, dispositions or transfers, if they are of the character described, shall, for the purpose of the principal clause, be revocable transfers. If that be the true interpretation, and we think it is, it would be impossible to hold that the third proviso does not operate in respect of settlements, dispositions or transfers which are by the first proviso revocable for the purpose of that clause.

In a case decided by the Bombay High Court *Ramji Keshavji v. Commissioner of Income-tax, Bombay*¹, Kania, J., in considering the scheme of section 16 (1) (c) observed :

1. I.L.R. (1945) Bom. 407 : A.I.R. 1945 Bom. 254.

"The first stage is that when there is a revocable transfer of assets, the income derived from such assets is still to be considered the income of the settlor. The law next specifies by the first proviso what would be deemed revocable transfer, in spite of the deed being apparently irrevocable. The relevant question for that proviso is this : Is this transfer revocable because it fulfils the conditions contained in the proviso ? The answer to that question can be only; it is revocable, or it is not. If the answer is in the negative, no further discussion can arise because, on the face of it, the deed is not revocable and therefore, it does not come under section 16 (1) (c). If, however, the answer to the question is in the affirmative, the deed, although ostensibly irrevocable, is deemed to be revocable, and thus becomes a revocable transfer of assets, within the meaning of the substantive provision of section 16 (1) (c). Having reached that stage, the law proceeds to consider further what is found in the third proviso. The scheme appears to be that although in fact, after reading the provisions of section 16 (1) (c) with the first proviso, the transfer is revocable, the law will not still consider the income derived from such a settlement the income of the settlor, provided the settlement is not revocable for a period exceeding six years or during the lifetime of the person for whom the income is settled, and, further, from which income the settlor derives no direct or indirect benefit."

In our view, that passage correctly summarises the effect of the third proviso to section 16 (1) (c).

The High Court was therefore right in holding that by virtue of the third proviso to section 16 (1) (c) of the Indian Income-tax Act, 1922, the income received by the beneficiaries under the deed of trust other than the assessee could not until the power of revocation arose to the assessee, be deemed to be the income of the assessee for the purpose of assessment to income-tax.

The appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—MR. K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

The Commissioner of Income-tax, Kerala and Coimbatore
(In all the Appeals)

*Appellant**

v.

P. Krishna Warriar (In all the Appeals)

Respondent.

Income-tax Act (XI of 1922) as amended by Act XXV of 1953; section 4 (3) (i) and clause (b)—Trust—Business, is property and can be held in trust—Definite percentage of income from—Wholly set apart for religious and charitable purposes—Exempt from taxation—Business held in trust—Business carried on behalf of religious or charitable institution—District matters separately dealt with.

A testator created a trust in respect of his properties among which were two businesses, and the main object of the trust was to carry on the two businesses. Sixty per cent. of the income from all the properties, including the business was to be utilized for religious and charitable purposes for the first twenty years and thereafter eight-five per cent. of the income for the same purposes, and the rest to be spent upon non-religious and non-charitable purposes. For the assessment years falling within the twenty years, the Department held that the sixty per cent. income was not exempt from taxation under section 4 (3) (i) as a result of the Amending Act of 1953. The Tribunal in appeal and the High Court on a reference held otherwise. The Department appealed to the Supreme Court,

Held, the sixty per cent. of the income from the trust properties is exempt from assessment to income-tax under section 4 (3) (i) of the Act.

The word 'property' is a term of the widest import and a business would undoubtedly be property, and could be held under trust for religious and charitable purpose.

The dichotomy between the two expressions "wholly" and "in part" is not based upon the dedication of the whole or a fractional part of the property but between the dedication of the said property wholly for religious or charitable purposes or in part for such purposes.

If half a house is held in trust wholly for religious or charitable purposes, it would be covered by the first part of the substantive clause of Cl. (i) for in that event the subject-matter of the trust is only the said half of the house and that half is held wholly for religious or charitable purposes.

The expression 'in part' therefore, must apply to a case other than a property a part of which is wholly held for religious or charitable purposes.

It is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment. Generally the natural presumption is that but for the proviso, the enacting part of the provision would have included the subject-matter of the proviso ; but the clear language of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the main provision, but is in itself a substantive provision.

Clause (b) of the proviso to section 4 (3) (i) is an independent provision dealing with a case of business which is not vested in trust for religious or charitable purposes but one carried on on behalf of a religious or charitable institution.

The words 'such income' occurring in the proviso only means the income accruing or arising in favour of the trust.

Appeals by Special Leave from the Judgment dated 20th January, 1961 of the Kerala High Court in Income-tax Referred Case No. 16 of 1959.

K. N. Rajagopal Sastri, Senior Advocate, (*R. N. Sachthey*, Advocate, with him), for Appellant (In all the Appeals).

S. T. Desai, Senior Advocate (*Sardar Bahadur*, Advocate, with him), for Respondent (In all the Appeals).

The Judgment of the Court was delivered by

Subba Rao, J.—These appeals by Special Leave raise the question of the construction of the provisions of section 4 (3) (i) of the Indian Income-tax Act, 1922, hereinafter called the Act, as amended by the Indian Income-tax (Amendment) Act, 1953, hereinafter called the Amending Act.

The facts are as follows : One P. S. Warriar, an eminent Ayurvedic physician, carried on business in Ayurvedic drugs under the name and style of "Arya Vaidya Sala" and was also running a hospital named "Arya Sikitsa Sala" and a school called "Arya Vaidya Pata Sala". The said Warriar died on January 30, 1944, after executing a will wherein he created a trust in respect of his properties, including the Arya Vaidya Sala. He gave directions to the trustees appointed under the said will to conduct the said business and to disburse the income therefrom in certain proportions to the Arya Vaidya Sala, Arya Sikitsa Sala and Arya Vaidya Pata Sala and to his descendants. Broadly stated 60 per cent. of the income was directed to be spent on the said three institutions and 40 per cent. to be given to his descendants. Till the Amending Act came into force the Income-tax Department gave exemption from assessment for the 60 per cent. of the income under section 4 (3) (i) of the Act ; but, after the Amending Act came into force, which was given retrospective operation from April 1, 1952, the said Department refused to give exemption from assessment even in regard to the 60 per cent. of the income. For the assessment years 1954-55 and 1955-56 the Income-tax Officer assessed the entire income from the said properties ; and in respect of the income pertaining to the assessment years 1952-53 and 1953-54, which had already been assessed in the usual course giving exemption for the said 60 per cent. of the income, the Income-tax Officer issued notice under section 34 of the Act and by two separate orders dated September 28, 1956, assessed the said 60 per cent. of the income on the basis of escaped assessment. On December 20, 1956, for the assessment year 1956-57 the Income-tax Officer, in the like manner, assessed the entire income from the said properties. The appeals filed by the assessee against the said orders of assessment to the Appellate Assistant Commissioner were dismissed. The appeals filed against the orders of the Appellate Assistant Commissioner to the Income-tax Appellate Tribunal, Madras, were consolidated and by its order dated February 28, 1958, the said Tribunal allowed the appeals exempting 60 per cent. of the said income from assessment to income-tax under section 4 (3) (i) of the Act. The References made to the High Court of Kerala were dismissed. Hence the present appeals.

Mr. Rajagopal Sastri, learned Counsel for the Revenue, contends that under section 4 (3) (i) of the Act whereunder the said income is given exemption from taxation, the property wherefrom the income is derived shall have been held under trust wholly or in part for religious or charitable purposes, that the business run under the name and style of Arya Vaidya Sala was not capable of being held in trust, that even if it was capable of being held under trust, it was not wholly or in part so

held in trust for religious or charitable purposes, as only a part of the income was directed to be spent for religious or charitable purposes and that in the circumstances clause (b) of the proviso was attracted but the conditions laid down thereunder were not complied with.

Learned Counsel for the respondent, Mr. S. T. Desai, contends that business is property within the meaning of section 4 (3) (i) of the Act and that it is held in trust in part for religious and charitable purposes and, therefore, the substantive part of the provision is attracted to the facts of the case and hence the proviso is excluded.

Before we construe the relevant provisions of the Act and consider the arguments advanced on either side, it would be convenient at the outset to read the material part of the will and to ascertain the scope of the bequest created thereunder. The will is marked as Annexure A-2 in the case. The relevant parts of the will read:

"1. Will executed by Panniampalli Warriath deceased Parvathi *alias* Kunkikutty Warassiar son Sri Sankunny Warriar known as Vaidyaratnam Sri P. S. Warriar, residing at Puthan Warriar in Kottakkal Amsom and Desom of Ernad Taluk."

"7. Apart from the properties mentioned in Schedules B, C and D all other properties, movable as well as immovable, belonging to me I hereby constitute into a trust to be managed by the trustee as per the directions in the will. They are described in Schedule E, and on my demise those properties will vest in the trustees. It is my intention that except the properties mentioned in paras. 4 and (B, C and D Schedules), all my properties are to be included in the Trust and therefore, even if some item of property is left out by inadvertence, it is also to be deemed included in the Trust and vested in the Trustees."

"8. *Provisions regarding the Trust.*—I hereby nominate the following persons as the first Board of Trustees:—

(Name of 7 persons given.)"

"9. The above Trust is to be managed and conducted according to the terms and conditions detailed below:—

A to F * * * *

G. The primary and chief objects to the Trust are to carry on for ever the two institutions viz., the Arya Vaidya Sala and the Arya Vaidya Hospital on the lines followed now with the object of enlarging and increasing their scope and utility. The work of Arya Vaidya Sala now consists of

- (1) preparation of Ayurvedic medicines,
- (2) sale of the same,
- (3) treatment of patients, receiving from them compensation according to their capacity and means,
- (4) to conduct research into Arya Vaidyam with a view to make it more and more useful to the public.

H. The following are the matters conducted in the institution called the Arya Vaidya Hospital

- (1) To examine poor patients free of charge, to prescribe treatment for them and give medicines gratis (out-patient Department).
- (2) To take in at least 12 poor patients at any time, give them lodging and board and also free medicines and treatment free (the in-patient Department).
- (3) To carry out the said services with the help of an Arya Vaidyan and necessary operations with the help of an Allopathic doctor.
- (4) Give treatment and medicines to all persons seeking them, receiving from such of them as are able such remuneration as they can afford including cost of medicines. The Arya Vaidya Hospital is now carried on with the medicines supplied by and taken from the Arya Vaidya Sala and the incidental expenses are now met from out of the funds of the Arya Vaidya Sala.

J. The trustees are to run the above institutions according to the intentions expressed above with such modifications as the circumstances may warrant.

K. In the Arya Vaidya Patasala run under the auspices of the Arya Samajam, Aryavaidyam is taught in accordance with the science of Ayurveda. I have been meeting the expenses of the said institutions, not covered by its income, from out of the profits of Arya Vaidya Sala.

L. Out of the net profits of the Arya Vaidya Sala 25% is to be devoted to the development of the Arya Vaidya Sala, 25% for meeting the expenses of the Arya Vaidya Hospital and 25% for division equally between the two tavazhies (this only for 20 years) out of the remaining 25% a sum not exceeding 10% may be according to requirements, utilised for the purposes of the Arya Vaidya Patasala. The balance, if any, that may remain out of the 10% after disbursement to the Arya Vaidya Patasala, may be used for the Arya Vaidya Sala itself. The balance 15% are to be deposited by the Trustees each year in approved banks as a Reserve fund for the two tavazhies for a period of

20 years and the fund thus accumulated inclusive of interest is to be divided equally among the two tavazhies equally *i.e.*, in moiety and it will be the duty of the Trustees to invest the same on the security of immovable properties.

M. The Trustees are not bound to pay any amount to the said two tavazhies after the expiry of 20 years. The 40% of the profit so earmarked for 20 years and so released after the expiry of 20 years are therefore to be utilised for the development of the Arya Vaidya Sala and Arya Vaidya Hospital according to the discretion of the Trustees.

E Schedule.—All remaining properties constituted into the Trust.”

It will be seen from the said recitals of the will that the testator created a trust in respect of his entire properties, including those mentioned in Schedules B, C and D and specifically vested them into the trustees appointed thereunder. The properties so vested included the business carried on in the name and style of Arya Vaidya Sala. The main objects of the trust were to carry on the said two institutions, namely, Arya Vaidya Sala and Arya Vaidya Hospital and also the other objects mentioned thereunder. Out of the income from the business so vested in the trustees, he directed the trustees to spend 25% for the development of Arya Vaidya Sala, 25% to meet the expenses of the Arya Vaidya Hospital, not exceeding 10% for the Arya Vaidya Patasala, 25% to be shared equally by two branches of the family of the testator for a period of 20 years and thereafter to be utilized for the purpose of the Arya Vaidya Sala and Arya Vaidya Hospital and 15% to be given to the said branches; that is to say, 60% of the total properties for a period of 20 years from the demise of the testator should be utilized for religious and charitable purposes and thereafter 85% to be utilized for the said purposes and the rest to be spent on non-religious and non-charitable purposes. Therefore, under the will the E Schedule properties, including the business, were held under trust and for the object of the trust was to be utilized 60% of the profits of the business for 20 years; 85% thereafter for religious and charitable purposes. The assessment years in question fell within 20 years from the death of the testator and, therefore, we are concerned only with 60% of the income from the trust properties. The question is whether the 60% of the income from the trust properties is exempt from assessment to income-tax under section 4 (3) (i) of the Act. The relevant provisions of the Act read :

Section 4 (3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them :

(i) any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto. Provided that such income shall be included in the total income.....

(b) in the case of income derived from the business carried on on behalf of a religious or charitable institution, unless the income is applied wholly for the purpose of the institution and either—

(i) the business is carried on in the course of the actual carrying out of a primary purpose of the institution or

(ii) the work in connection with the business is mainly carried on by beneficiaries of the institution.

A brief history of the proviso may not be out of place here. Before the amendment of this clause by the Amending Act of 1953 the proviso was in the form of a separate substantive clause and was numbered as clause (i-a). The said clause (i-a) came under judicial scrutiny. It was argued on behalf of the Revenue that though a business was held under trust for religious or charitable purposes, it would fall under clause (i-a) and the income therefrom could not be exempted from income-tax unless the conditions laid down in the said clause were complied with. In *Charitable Gadodia Swadeshi Stores v. Commissioner of Income-tax, Punjab*¹, the Lahore High Court rejected that contention, and one of the reasons given for the rejection was that if the said clause was intended to narrow down the scope of clause (i), the said clause should have been added as a proviso to the old clause. Presumably on the basis of this suggestion the Amending Act of 1953 substituted clause (i-a) by clause (b) of the proviso. But it is not an inflexible rule of construction that a proviso in a statute should always be read as a limitation upon the effect of the main enactment.

Generally the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso; but the clear language of the substantive provision as well as the proviso may establish that the proviso is not a qualifying clause of the main provision, but is in itself a substantive provision. In the words of Maxwell, "the true principle in that the sound view of the enacting clause, the saving clause and the proviso taken and construed together is to prevail". So construed we find no difficulty, as we will indicate later in our judgment, in holding that the said clause (b) of the proviso deals with a case of business which is not vested in trust for religious or charitable purposes within the meaning of the substantive clause of section 4 (3) (i).

With these introductory remarks we shall proceed to construe the provisions of section 4 (3) (i) of the Act along with clause (b) of the proviso. Under clause (i), so far as it is relevant to the question raised before us, to earn the exemption the income shall have been derived from property under trust wholly or in part held for religious or charitable purposes. Under clause (b) of the proviso to that clause, in the case of income derived from business carried on on behalf of a religious or charitable institution, unless the conditions laid down thereunder are complied with, the said income cannot be exempted. If business is property and is held under trust wholly or partly for religious or charitable purposes, it falls squarely under the substantive part of clause (i) and in that event clause (b) of the proviso cannot be attracted, as under that clause of the proviso the business mentioned therein is not held under trust but one carried on on behalf of a religious or charitable institution. To take a business out of the substantive clause (i) of section 4 (3) and place it in clause (b) of the proviso, it is suggested that business is not property and that even if it is property the said property is not wholly or partly held in trust for religious or charitable purposes. That business is property is now well settled. The Privy Council in *In re Trustees of the Tribune*¹ did not question the view expressed by the Bombay High Court that business of running the newspaper Tribunal was property held under trust for charitable purposes. This Court in *J. K. Trust, Bombay v. Commissioner of Income-tax, Excess Profits Tax, Bombay*², endorsed the said view and held that "property" is a term of the widest import and that business would undoubtedly be property unless there was something to the contrary in the enactment. If business was property, it could be held under trust for religious and charitable purposes. As the business of running the Arya Vaidya Sala vested under trust for religious and charitable purposes, it would fall under clause (i) if the other conditions laid down therein were satisfied. The necessary condition for the application of clause (i) of section 4 (3) of the Act is that the said property, namely, the business, shall have been wholly or in part held for religious or charitable purposes. As 40 per cent. of the profits in the business would be given to purposes other than religious or charitable purposes it cannot be said that the business was held wholly for religious or charitable purposes. But as 60 per cent. of the profits thereof would be spent for religious or charitable purposes, the question is whether it can be held that the business was held in trust in part for religious or charitable purposes. The argument advanced on behalf of the Revenue is that the expression "in part" in clause (i) applies only to a case where an aliquot part of property is vested in trust and that is not legally possible in the case of business. It is said that a business is one and indivisible and, therefore, the subject-matter of trust can only be the share of the profits payable to a partner during the continuance of the partnership or after its dissolution. Reliance is placed in support of the said proposition on the decisions in *K. A. Ramachar v. Commissioner of Income-tax, Madras*³, *David Burnet v. Charles P. Leininger*⁴, *Mohammad Ibrahim Riza v. Commissioner of Income-tax, Nagpur*⁵. The first two decisions dealt with a different problem, viz., whether an assessee is liable to tax on his share of profits in a firm after settling or assigning the same in

1. (1939) 2 M.L.J. 444 : L.R. 66 I.A. 241. A.I.R. 1961 S.C. 1059.
 2. (1957) S.C.J. 845 : 1958 S.C.R. 65 : 4. (1932) 76 L. Ed. 665.
 A.I.R. 1957 S.C. 846. 5. (1930) 59 M.L.J. 905 : L.R. 57 I.A. 260 :
 3. (1962) 2 S.C.J. 504 : (1961) 3 S.C.R. 380 : I.L.R. 58 Cal. 395.

favour of a third party and the Courts have held that the profits accrued to the assessee before the assignments could operate on them and he was liable to be assessed to tax on the said profits. In the third decision, the Judicial Committee held that there was no valid trust for charitable purposes, as the utilization of the income to charitable or secular purposes was left to the absolute discretion of the head of the community. None of the three decisions has any bearing on the question whether a business could be held in trust wholly or in part for religious or charitable purposes. That question falls to be considered on different considerations.

In our view, the expression "in part" does not refer to an aliquot part; if half a house is held in trust wholly for religious or charitable purposes, it would be covered by the first part of the substantive clause of clause (i), for in that event the subject-matter of the trust is only the said half of the house and that half is held wholly for religious or charitable purposes. The expression "in part", therefore, must apply to a case other than a property a part of which is wholly held for religious or charitable purposes. In India there are a variety of trusts wherein there is no complete dedication of the property but only a partial dedication. A property may be dedicated entirely to a religious or charitable institution or to a deity. This is an instance of complete dedication. A property may be dedicated to a deity, subject to a charge that a part of the income shall be given to the grantor's heirs. A property may be given to an individual subject to, or burdened with, a charge in favour of an idol or a religious institution or for charitable purposes. An owner of property may retain the property for himself but carve out a beneficial interest therefrom in favour of the public by way of easement or otherwise. There may be many other instances where though there is a trust, it involves only a partial dedication of the property held under trust in the sense that only a part of the income of that property is utilized for religious or charitable purposes. The dichotomy between the two expressions "wholly" and "in part" is not based upon the dedication of the whole or a fractional part of the property, but between the dedication of the said property wholly for religious or charitable purposes or in part for such purposes. If so understood, the two limbs of the substantive clause fall into a piece. The first limb deals with a property or a part of it held in trust wholly for religious or charitable purposes, and the second limb provides for such a property held in trust partly for religious or charitable purposes. On the said reading of the provision it follows that the entire business of Arya Vaidya Sala is held in trust for utilizing 50 per cent. of its profits, i.e., a part of the income, for religious or charitable purposes. The present case, therefore, falls squarely within the scope of the substantive part of clause (i) of section 4 (3) of the Act.

Even so it is contended that clause (b) of the proviso imposes further limitations before the exemption can be granted. But the said clause of the proviso only applies to the case of income derived from business carried on on behalf of a religious or charitable institution. A business held in trust wholly or in part for religious or charitable purposes is not a business carried on on behalf of a religious or charitable institution, for the business itself is held in trust. A few decisions cited at the Bar bringing out the distinction between the substantive part of clause (i) of section 4 (3) and clause (b) of the proviso may usefully be referred to at this stage. Where a business was held in trust for charitable purposes, a Division Bench of the Bombay High Court in *Dharma Vijaya Agency v. Commissioner of Income-tax, Bombay City-I*,¹ held that it was not business which was carried on on behalf of religious or charitable institutions within the meaning of clause (b) of the proviso. Shah, J., after considering the relevant authorities and the provisions of the Act, observed :

"In our view, the business referred to in clause (b) of the proviso need not be business which is held for religious or charitable purposes, provided it is business carried on on behalf of a religious or charitable institution."

Desai, J., stated thus :

".....it is impossible to equate the scope of proviso (b) with the scope of consisting of business held under trust wholly for religious or charitable purposes. It

necessity mean that we have in clause (i) a very wide category of business which is trust property, and we have in proviso (b) a restricted and a lesser category of business which is carried on by or on behalf of a religious or charitable institution."

A Division Bench of the Kerala High Court in *Dharmodayam Co. v. Commissioner of Income-tax, Kerala*¹, expressed much to the same effect. A Division Bench of the Madras High Court, in *Thiagesar Dharma Vanikam v. Commissioner of Income-tax, Madras*², after considering the decisions of the various High Courts and the relevant provisions of the Act, observed :

"When the trustee acts, it is only the trust that acts, as the trustee fully represents the trust. A business carried on on behalf of a trust rather indicates a business which is not held in trust, than a business of the trust run by the trustees."

It concluded thus :

"In our opinion proviso (b) to section 4 (3) (i) does not restrict the operation of the main provision in section 4 (3) (i). If a trust carried on business and the business itself is held in trust and the income from such business is applied or accumulated for application for the purpose of the trust, which must of course be of a religious or a charitable character, the conditions prescribed in section 4 (3) (i) are fulfilled and the income is exempt from taxation. This exemption cannot be defeated even if the business were to be conducted by somebody else acting on behalf of the trust. Proviso (b) to section 4 (3) (i) has application only to businesses which are not held in trust, and the field of its operation is, therefore, distinct and separate from that covered by section 4 (3) (i)."

Emphasis is laid upon the expression "such income" in the opening words of the proviso and a contention is raised that the income dealt with in the proviso is income derived from property held under trust. To state it differently, the adjective "such" in the expression "such income" refers back to the income in the substantive clause. There is some plausibility in the contention, but if the interpretation be accepted, we will be attributing an intention to the Legislature to make a distinction between business and other property though both of them are held under trust. There is no acceptable reason for this distinction. That apart, the expression "such" may as well refer to the "income" in the opening sentence of sub-section (3). The said sub-section says that the incomes mentioned thereunder shall not be included in the total income, but the proviso lifts the ban and says that such incomes shall be included in the total income if the conditions laid down are satisfied. We think that the expression "such income" only means the income accruing or arising in favour of the trust.

The legal position may briefly be stated thus. Clause (1) of section 4 (3) of the Act takes in every property or a fractional part of it held in trust, wholly for religious or charitable purposes. It also takes in such property held only in part for such purposes. Business is also property within the meaning of the said clause. Clause (b) of the proviso to section 4 (3) (i) applies only to a business not held in trust but carried on on behalf of religious or charitable institutions.

For the foregoing reasons we hold that the High Court has correctly answered the question referred to it.

In the result, the appeals fail and are dismissed with costs. One set of hearing fees.

V. S.

Appeals dismissed.

1. (1962) 45 I.T.R. 478.

2. (1963) 50 I.T.R. 798, 807, 809 : I.L.R.

(1963) Mad. 660.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

The Commissioner of Income-tax, Madras

.. Appellant*

v.

Sivakasi Match Exporting Company, Sivakasi

.. Respondent.

Income-tax Act, (XI of 1922), section 26-A—Registration of Firms—Jurisdiction of officer—Conformity to rules and genuineness of partnership, only relevant questions—Judicial exercise of discretion—Partners of different firms constituting assessee-firm in individual capacity—Capital contribution by one firm to partner of assessee-firm—Marketing products of firms by assessee firm for commission—Assessee-firm, if entitled to registration—Section 66—Question of law—Tribunal—Registration of firm—Finding—Exceeding jurisdiction—Construction of document—Absence of evidence—Irrelevant considerations—Interference by High Court.

Partners of five firms doing business in Match Works, formed another partnership firm, each partner representing his firm, to carry on the business of banking and commission agents, the principal business being the marketing of the products of the different match factories. An application for registration of the firm under the Act was refused on the ground that different firms could not constitute a partnership. Then the partners in their individual capacity constituted another partnership by a deed and applied for registration. Under clause 16 of the deed, the parent firms were expected to effect their sales through the assessee-firm for a commission. Registration was allowed by the Officer, but was refused by the Commissioner of Income-tax acting under section 33-B. On appeal the Tribunal confirmed the refusal and on a Reference to the High Court the application was allowed on the finding that partnership was a genuine one. The Department appealed to the Supreme Court.

Held by Majority: The assessee is entitled to registration. The jurisdiction of the officer in dealing with an application for registration under section 26-A, is confined to ascertaining of two facts, namely, (i) whether the application is in conformity with the rules made under the Act, and (ii) whether the firm shown in the document presented for registration is a bogus one or has no real existence. Further the discretion conferred on him under the section is a judicial one and he cannot refuse to register a firm on mere speculation, but he shall base his conclusion on relevant evidence.

If the order refusing registration goes beyond the scope of the jurisdiction conferred on the officer under the section and the Rules made thereunder or if the decision depends upon the construction of the partnership deed or if there is no evidence to sustain the finding of the Tribunal, then the High Court will have jurisdiction to entertain the Reference under section 66 (2) of the Act as a question of law.

Held on facts : The document *ex facie* disclosed valid partnership avowedly entered into by the partners in their individual capacity. The fact that one of them borrowed the capital from the parent firm cannot make it any the less a genuine firm. Clause 16 of the deed providing for the levy of commission for the marketing of the products of the parent firm does not detract from its genuineness.

The Tribunal mixed up to the two concepts, *viz.*, the legality of the partnership and the ultimate destination of the partners' profits. It also mixed up the question of the validity of the partnership and the object of the individual partners in entering into the partnership. As the Tribunal misconstrued the provisions of the partnership deed and relied upon irrelevant considerations in coming to the conclusion it did, the High Court rightly differed from the view of the Tribunal.

Per Shah, J.: The Tribunal adverted to three factors, namely, (i) the terms of the deed of partnership purported to impose an obligation to pay commission on the production of the five match factories, representatives of which sought to join as partners *eo nomine*, (ii) contribution of capital by one of the parent firms to the assessee firm, and (iii) the ultimate distribution of profits by the individual partners among the partners of the match factories.

It was exclusively within the province of the Tribunal to decide the question on the evidence before it and the decision that in entering into the deed of partnership the named partners represented their respective match factories, was not open to be canvassed in a Reference under section 66 (2) of the Act. When the High Court observed that they were satisfied that the Tribunal had not correctly appreciated the evidence in arriving at the conclusion that each match factory was the real party in the instrument of partnership, they assumed to themselves jurisdiction which they did not possess.

Appeal by Special Leave from the Judgment and Order dated 11th January, 1961 of the Madras High Court in Case Referred No. 131 of 1956.

H. N. Sanyal, Solicitor-General of India (*N. D. Karkhanis* and *R. N. Sachthey*, Advocates, with him), for Appellant.

K. Srinivasan and *R. Gopalakrishnan*, Advocates, for Respondent.

The following Judgments were delivered :

Subba Rao, J. (for himself and *Sikri, J.*)—This appeal by Special Leave is directed against the order of the High Court of Madras in a Reference made to it by the Income-tax Appellate Tribunal under section 66 (2) of the Indian Income-tax Act, 1922, hereinafter called the Act.

The facts that have given rise to the appeal may briefly be stated. There are 5 firms in Sivakasi manufacturing matches under the name and style of Shenbagam Match Works, Brilliant Match Works, Manoranjitha Match Works, Pioneer Match Works and Gnanam Match Works. The total number of the partners of all the 5 firms does not exceed 10 or 11 in number. Rajamoney Nadar is the sole proprietor of Shenbagam Match Works and in the other 4 firms there are more than one partner. In the year 1948 a person from each of those firms in his representative capacity formed a partnership to carry on the business of banking and commission agents, the principal business being the marketing of the products of the different match factories in Sivakasi. When the said partnership applied for registration for the assessment year 1949-50, it was refused by the Income-tax Department on the ground that different firms could not constitute a valid partnership. Thereafter, Sankaralinga Nadar, Arumughaswami Nadar, Arunachala Nadar, Palaniswami Nadar and Rajamoney Nadar, the first four being one of the partners of their respective firms and the last being the sole proprietor of his firm, in their individual capacity entered into a partnership for the aforesaid purpose and executed a partnership deed dated 1st April, 1950. They presented the said deed of partnership to the Income-tax Officer for registration. The Income-tax Officer by his order dated 27th October, 1952 registered the same under section 26-A of the Act; but the Commissioner of Income-tax, acting under section 33-B of the Act, cancelled the registration by an order dated 23rd October, 1954, and directed the assessment to take place as that of an unregistered firm. On appeal, the Income-tax Appellate Tribunal held, on a construction of the partnership deed and also on the basis of some other circumstances, that the said deed "is not genuine and brought into existence only as a simulate arrangement, that the profits which are distributed under the deed to the individuals mentioned therein are not the true profits of those individuals." In short it held that the said partnership deed was not a genuine one. On a Reference made to the High Court of Judicature at Madras, a Division Bench of the High Court, on a construction of the document, came to the conclusion that the Match Works were not the real parties to the partnership but the parties of the document were the real partners. Hence the present appeal.

Learned Counsel for the Revenue raises before us the following two points, namely, (i) the finding of the Appellate Tribunal was one of fact and that the High Court had no jurisdiction to canvass the correctness of its finding on a Reference made under section 66 (2) of the Act, and (ii) the conclusion arrived at by the Tribunal was the correct one and the High Court erroneously interfered with it.

It is commonplace that under section 66 (2) of the Act a Reference to the High Court lies only on a question of law. The scope of the provision has been elaborately considered by this Court in *Sree Meenakshi Mills, Ltd. v. Commissioner of Income-tax, Madras*¹. Therein the scope of the provision has been laid down under different propositions. On the basis of the judgment it cannot be gainsaid that if the order refusing registration goes beyond the scope of the jurisdiction conferred on the Income-tax Officer under section 26-A of the Act and the Rules made thereunder or if the decision depends upon the construction of the partnership deed or if there is no evidence to sustain the finding of the Tribunal, then the High Court will have jurisdiction to entertain the Reference under section 66 (2) of the Act. In our view, the finding of the Tribunal falls squarely under the said three heads. The relevant provisions of the Act read thus :

Section 26-A.—(1) Application may be made to the Income-tax Officer on behalf of any firm, constituted under an instrument of partnership specifying the individual shares of the partners,

1. (1957) 1 M.L.J. (S.C.) 1 : (1957) 1 An. 691.
W.R. (S.C.) 1 : (1957) S.C.J. 1 : (1956) S.C.R.

for registration for the purposes of this Act and of any other enactment for the time being in force relating to income-tax or super-tax.

(2) The application shall be made by such person or persons, and at such times and shall contain such particulars and shall be in such form, and be verified in such manner, as may be prescribed; and it shall be dealt with by the Income-tax Officer in such manner as may be prescribed.

In exercise of the powers conferred by section 59 of the Act, the Central Board of Revenue made the following rules:

Rule 2.—Any firm constituted under an instrument of partnership specifying the individual shares of the partners may, under the provisions of section 26-A of the Indian Income-tax Act, 1922 (hereinafter in these rules referred to as the Act), register with the Income-tax Officer, the particulars contained in the said Instrument on application made in this behalf.

Such application shall be given by all the partners (not being minors) personally and shall be made—

(a) before the income of the firm is assessed for any year under section 23 of the Act, or

* * * * *

Rule 3.—The application referred to in rule 2 shall be made in the form annexed to this rule and shall be accompanied by the original Instrument of Partnership under which the firm is constituted, together with a copy thereof:

* * * * *

FORM 1

Form of Application for Registration of a Firm under section 26-A of the Indian Income-tax Act, 1922.

* * * * *

Rule 4.—If, on receipt of the application referred to in rule 3, the Income-tax Officer is satisfied that there is or was a firm in existence constituted as shown in the instrument of partnership and that the application has been properly made, he shall enter in writing at the foot of the instrument or certified copy, as the case may be, a certificate in the following form, namely:—

* * * * *

Rule 6-B.—In the event of the Income-tax Officer being satisfied that the certificate granted under Rule 6-A, has been obtained without there being a genuine firm in existence, he may cancel the certificate so granted.

A combined effect of section 26-A of the Act and the Rules made thereunder is that if the application made by a firm gives the necessary particulars prescribed by the Rules, the Income-tax Officer cannot reject it, if there is a firm in existence as shown in the instrument of partnership. A firm may be said to be not in existence if it is a bogus or not a genuine one, or if in law the constitution of the partnership is void. The jurisdiction of the Income-tax Officer is, therefore, confined to the ascertaining of two facts, namely, (i) whether the application for registration is in conformity with the Rules made under the Act, and (ii) whether the firm shown in the document presented for registration is a bogus one or has no legal existence. Further, the discretion conferred on him under section 26-A is a judicial one and he cannot refuse to register a firm on mere speculation, but he shall base his conclusion on relevant evidence.

What are the facts in the present case? The partnership deed is dated 1st April, 1950. In the document five persons are shown as its partners. The name of the firm is given, the objects of the partnership business are described, the duration of the business is prescribed and the capital fixed is divided between them in equal shares. Clause 16 of the Partnership deed, on which the Tribunal relied reads:

“This firm shall collect a commission of half an anna per gross on the entire production of the match factories of the partners, respectively, the Brilliant Match Works, Manoranjitha Match Works, Pioneer Match Works, Shenbagam Match Works and Gnanam Match Works produced from 1st April, 1950, whether sales were effected through this firm or not and a further commission of half an anna per gross on the sales effected through this firm. This commission will be collected on all kinds of matches produced from the abovesaid factories. The commission of half an anna per gross on the entire production of these factories accrued due at the end of every month shall be debited to the respective factories under advice to them.”

Clauses 22 and 23 which throw further light on the question raised read:

Clause 22.—The business of this firm shall have and has no connection with the match manufacturing business carried on now by the partners separately or in partnership with others.

Clause 23.—Any loss to the firm by way of fire, accident or by any other cause during the course of the business of the firm, notwithstanding the fact that the loss might have arisen on the sale of or transaction relating to the match manufacturing concerns of the partners to this deed, shall be borne by this firm and shall be equally divided between the partners to this deed.

It is not disputed that the partnership deed *ex facie* conforms to the requirements of the law of partnership as well as the Income-tax Act. Under section 4 of the Indian Partnership Act partnership is the relation between persons who have agreed to share the profits of the business carried on by all or any of them acting for all persons who have entered into the partnership with one another called individually partners and collectively a firm and the name under which the business is carried on is called the firm name. The document certainly conforms to the said definition. There is also no prohibition under the Partnership Act against a partner or partners of other firms combining together to form a separate partnership to carry on a different business. The fact that such a partner or partners entered into a sub-partnership with others in respect of their share does not detract from the validity of the partnership; nor the manner in which the said partner deals with the shares of his profits is of any relevance to the question of the validity of the partnership. The document, therefore, embodies a valid partnership entered into in conformity with the law of partnership.

But the Tribunal has held that the partnership is not a genuine one for the following reasons : (i) previously the firm entered into a partnership but the registration of the same was rejected ; (ii) under clause 16 of the Partnership Deed the firm has the right to collect the commission of the entire match production of the larger partnerships whether they effect their sales through the firm or not ; (iii) the books of Gnanam Match Works show unmistakably that the capital was contributed not by Palaniswamy Nadar in his individual capacity but by the larger firm as such ; and (iv) regarding the other three larger firms also the profits delivered by their representatives from the assessee firm was divided amongst all the partners according to their profit-sharing ratio in the larger firms. On the other hand, the High Court found, on a construction of the relevant clauses of the partnership deed, that the business was the business of the partners of the firms alone and that the two circumstances relied upon by the Tribunal were irrelevant in ascertaining whether the said partnership was real or not. We have already pointed out that the document *ex facie* discloses a valid partnership. The partnership was avowedly entered into by the partners in their individual capacity as their previous partnership in their representative capacity was not registered on the ground that such a partnership was illegal. If the larger firms cannot constitute members of a new partnership, some of the partners of those firms can certainly enter into a partnership shedding their representative capacity if they can legally do so. If they can do so, the mere fact that one of them borrowed the capital from a parent firm—we are using this expression for convenience of reference—or some of them surrendered their profits to the parent firm cannot make it any the less a genuine firm. Nor does clause 16 of the Partnership Deed detract from its genuineness: that clause does not create any right in the partnership to collect the commission ; in view of the close connection between the assessee-firm and the parent firms, the parent firms were expected to effect all their sales through the assessee firm. If they did not and if they refused to pay commission, the assessee-firm could not enforce its right under the said clause. Clause 22 in express terms emphasizes the separate identities of the assessee-firm and the parent firms and clause 23 declares that notwithstanding the fact that the loss to the assessee-firm has arisen on the sale or transaction relating to the match manufacturing concerns, the assessee-firm alone shall bear the loss and thereby indicates that the loss of the assessee-firm will not be borne by the parent firms. If the assessee-firm has an existence, the two circumstances relied upon by the Tribunal, namely, that Palaniswamy Nadar, one of the partners of the assessee firm, brought in the capital from his parent firm or that the profits earned by some of the partners were surrendered to the parent firms, would be irrelevant. A partner of a firm can certainly secure his capital from any source or surrender his profits to his sub-partner or any other person. Those facts cannot conceivably convert a valid partnership into a bogus one.

The Tribunal mixed up the two concepts, viz., the legality of the partnership and the ultimate destination of the partners' profits. It also mixed up the question of the validity of the partnership and the object of the individual partners in entering into the partnership. If to avoid a legal difficulty 5 individuals, though four of them are members of different firms, enter into a partnership expressly to comply with a provision of law, we do not see any question of fraud or genuineness involved. It is a genuine document and it complies with the requirements of law. It is not an attempt to evade tax, but a legal device to reduce its tax liability. The fact that all the partners of all the firms did not exceed 21 in number and if they chose all of them could have entered into the partnership indicates that there was no sinister motive behind the partnership. As the Tribunal misconstrued the provisions of the partnership deed and relied upon irrelevant considerations in coming to the conclusion it did, the High Court rightly differed from the view of the Tribunal. In the circumstances, in view of the decision of this Court in *Sree Meenakshi Mills' case*¹, a question of law within the meaning of section 66 (2) of the Act arose for decision. The High Court rightly answered the question in the negative.

In the result, the appeal is dismissed with costs.

Shah, J.—Sivakasi Match Export Company—hereinafter referred to as 'the assessee'—is a partnership "carrying on business as bankers, commission agents and distributors of the products of different match factories at Sivakasi in the State of Madras". The assessee was formed under a deed, dated 1st April, 1950. There were five partners of the firm (1) N. A. P. M. Sankaralinga Nadar, (2) K. S. S. Arumughaswami Nadar, (3) K. A. S. Arunachala Nadar, (4) K. P. A. T. Rajamoney Nadar and (5) V. S. V. Palaniswamy Nadar. Before 1st April, 1950, there existed a firm also named Sivakasi Match Exporting Company which "consisted of a combine of six match factories" at Sivakasi constituted under a partnership deed dated 12th March, 1948. Registration of this partnership under section 26-A of the Income-tax Act, 1922, was refused on the ground that the partnership deed did not specify the actual shares of the individual partners. Thereafter a deed forming the partnership which is sought to be registered in these proceedings was executed on 1st April, 1950. It was recited in the preamble that originally four out of the five partners had been carrying on business in partnership as representatives of their respective match concerns, and it was found necessary that they should carry on the said business from 1st April, 1950, jointly in their individual capacity, and it was agreed to admit into their partnership as and from 1st April, 1950, the fifth person, namely V. S. V. Palaniswamy Nadar. The following are the material paragraphs of the agreement of partnership :

"(16) This firm shall collect a commission of half an anna per gross on the entire production of the Match factories of the partners, respectively, the Brilliant Match Works, Manoranjitha Match Works, Pioneer Match Works, Shenbagam Match Works and Gnanam Match Works, produced from 1st April, 1950, whether sales were effected through this firm or not and a further commission of half an anna per gross on the sales effected through this firm. This commission will be collected on all kinds of matches produced from the abovesaid factories. The commission of half an anna per gross on the entire production of these factories accrued due at the end of every month shall be debited to the respective factories under advice to them.

(22) The business of this firm shall have and has no connection with the match manufacturing business carried on now by the partners separately or in partnership with others.

(23) Any loss to the firm by way of fire, accident or by any other cause during the course of the business of the firm, notwithstanding the fact that the loss might have arisen on the sale of or transaction relating to the match manufacturing concerns of the partners to this deed, shall be borne by this firm and shall be equally divided between the partners to this deed."

It is common ground that each partner was concerned in the manufacture of matches either as owner or as partner with others. Sankaralinga Nadar carried on business as a manufacturer of matches with two others in the name of the Brilliant Match Works, Arumughaswamy Nadar as a partner with three others in the name of the Manoranjitha Match Works, Arunachala Nadar as a partner with two others in the name of the Pioneer Match Works, Rajamoney Nadar as a sole pro-

1. (1957) 1 M.L.J. (S.C.) 1: (1957) 1 An. W.R. (S.C.) 1: (1957) S.C.J. 1: (1956) S.C.R. 691.

prietor of the Shenbagam Match Works, and Palaniswamy Nadar as a partner with three others in the name of the Gnanam Match Works.

On 27th October, 1952, the Income-tax Officer passed an order under section 26-A granting registration of the partnership constituted under the deed dated 1st April, 1950, but the Commissioner of Income-tax, Madras, exercising revisional jurisdiction under section 33-B of the Act, set aside the order and directed that the partnership be assessed to tax as an unregistered firm. In the view of the Commissioner the partnership deed did not represent the true state of affairs and "the actual position as distinguished from the recitals in the partnership deed was that all the partners of the Match Factories were directly partners of the assessee" and as the names of all the partners were not set out in the deed and the other requirements relating to registration had not been complied with, registration be refused. The order was confirmed in appeal to the Income-tax Appellate Tribunal.

At the direction of the High Court of Madras under section 66 (2) of the Indian Income-tax Act, 1922, the Tribunal referred the following question :

"Whether on the facts and the circumstances of the case the refusal of registration of the assessee firm under section 26-A of the Income-tax Act was correct in law ?"

The High Court answered this question in the negative. Against that order, with Special Leave, the Commissioner of Income-tax has appealed to this Court.

The Tribunal held that the covenant in the deed of partnership and specially in paragraphs 3 and 16 viewed in the light of the entry in the books of account of Gnanam Match Works debiting the capital contributed in the name of Palaniswamy Nadar to the assessee, and not in the name of its partner, and division of the profits received from the assessee by Palaniswamy Nadar, Sankaralinga Nadar, Arumughaswamy Nadar and Arunachalam Nadar with other owners of their respective business, indicated that the named partners were acting as representatives of those owners. The High Court also held that clause 16 of the Partnership Agreement did not impose any liability upon the manufacturing concerns to pay any commission as stipulated therein on the production of the match factories. The High Court observed :

"Clause 16 does not lay any liability upon the manufacturing concerns and cannot operate as an enforceable contract against those other match companies. If one of those match companies should decline to put through its sales business through the assessee-firm, the only result would perhaps be that the partnership would not advance moneys or finance to that manufacturing concern ; it might also be that the particular partner interested in the manufacturing concern might stand to lose the benefit of this partnership. But that is not the same thing as to say that those manufacturing concerns themselves had become partners of the assessee partnership."

The High Court also observed that the assessee was not concerned with the disposal of the profits received by its partners. Finally the High Court observed that

"an individual member of the partnership is not prevented from engaging in business as member of another partnership. The law does not prohibit such a course and even the Income-tax law relating to registration of partnerships only refuses registration when the formation of such partnerships is intended to evade the incidence of Income-tax and nothing more. We are not satisfied that the Tribunal correctly appreciated the facts of the present case in coming to the conclusion that the match works were the real parties to this instrument of partnership."

The Solicitor-General for the Commissioner contended that the High Court had in exercising its advisory jurisdiction, in substance assumed appellate powers and had sought to reappraise the evidence on which the conclusion of the Tribunal was founded. Counsel contended that the Tribunal had recorded a clear finding on the facts that the "match works were the real" partners, and the High Court was bound on the question framed to record its opinion on the questions of law referred on the basis of that finding.

Section 26-A of the Indian Income-tax Act enacts the procedure for registration of firms. By that section on behalf of any firm application may be submitted to the Income-tax Officer for registration, if the firm is constituted under an instrument of partnership, specifying the individual shares of the partners. The application has to be made by such person or persons and at such times and shall contain such particulars and shall be in such form as may be prescribed. It is open to a firm

to carry on business without registration under the Indian Registration Act. By obtaining an order of registration, the partners of the firm are enabled to get the benefit of lower rates of tax than those applicable to the whole income of the firm, when charged as a unit of assessment. In the relevant year of assessment if the firm was unregistered the tax payable by it had to be determined as in the case of any other distinct entity and tax had to be levied on the firm itself. If, however, the firm was registered, the firm did not pay the tax and therefore the tax payable by the firm was not determined, but the share of profit received from the firm was added to the income of each partner, and on the total so determined tax was levied against the partners individually. It is manifest that if the firm desired to secure this privilege it had to conform strictly to the requirements prescribed by law. Under the Rules framed under section 59 of the Indian Income-tax Act, 1922, rules 2 to 6-B deal with registration and renewal of registration of firms. The application for registration has to be signed by all the partners (not being minors) personally, and the application has to be in the form prescribed by rule 3. The form prescribed requires the partners of the firm to disclose the names of each partner, his address, date of admittance to partnership and other relevant particulars including each partner's share in the profits and loss, "particulars of the firm as constituted at the date" of the application, and particulars of the apportionment of the income, profits or gains or loss of the business, profession or vocation in the previous year between the partners who in that previous year were entitled to share in such income, profits or gains or loss, where the application is made after the end of the relevant previous year. If the Income-tax Officer is satisfied that there is a firm in existence constituted as shown in the instrument of partnership and the application has been properly made, he has to enter in writing the fact of the instrument or certified copy, as the case may be, and a certificate of registration of the partnership under section 26-A of the Act. This certificate of registration enures only for the year mentioned therein, but the firm is entitled to obtain renewal of the registration.

On the conclusion recorded by the Tribunal that the partnership deed dated 1st April, 1950, was in truth an instrument relating to an agreement to carry on business by all the persons who owned the five businesses of which the representatives signed the deed, the application submitted by the five named partners of the assessee did not conform to the requirements of rules 2 and 3 and the Income-tax Officer was bound to refuse registration. It is true that the ground given by the Tribunal that the share of profits received by individual partners of the assessee was distributed by four of those partners who had entered into partnership contracts with other persons in the business of their respective match factories, standing independently of other grounds, may not be of much value in deciding whether all the partners of the match factories were intended to be partners of the assessee. It is open to a partner who receives his share in the profits of the firm to dispose of that share in any manner he pleases, and no inference from the distribution of the share of such profits alone can lead to the inference that the persons who ultimately received the benefit of the profits are partners of the firm which had distributed the profits. But the Tribunal adverted to three circumstances. The terms of the deed of partnership purported to impose an obligation to pay commission on the production of the five match factories, representatives of which sought to join as partners *eo nomine*. Imposition of such an obligation was in the view of the Tribunal inconsistent with the representatives of those factories being partners of the assessee in their individual capacities. Again it was found that Gnanam Match Works had contributed capital to the assessee directly and not through its representative. These two circumstances, coupled with the ultimate distribution of profits by the individual partners among the partners of the match factories, led to the inference that each partner who signed the deed dated 1st April, 1950, was acting not in his personal capacity, but as representing a match factory. Granting that the evidence from which the inference was drawn was not very cogent, it was still exclusively within the province of the Tribunal to decide that question on the evidence before it, and its decision that in entering into the deed of partnership, the named partners represented their respective match factories, was not open to be quashed in a Reference under section 66 (2) of the Indian Income-tax Act. The

High Court observed that clause 16 of the Partnership Deed did not impose any obligation upon the partners or the representatives of the five firms to pay commission as stipulated under that clause. Undoubtedly, there is no covenant expressly imposing such liability upon the match factories, but it was open to the Tribunal from the incorporation of such an unusual covenant to infer that the named partners of the assessee were acting as representatives of their respective factories. To assume from the terms of clause 16 that the owners of these match factories were not bound by the covenants contained in clause 16 is to assume the answer to the question posed for opinion. There was also the circumstance that in the books of account of the Gnanam Match Works of which Palaniswamy Nadar was a representative, capital was debited as contributed to the assessee. This indicated that the Gnanam Match Works was directly interested in the partnership. If that factory had made an advance to Palaniswamy Nadar to enable the latter to contribute his share of the capital, the entry in the factory's books of account would have been in the name of its partner and not in the name of the assessee. That also is a circumstance justifying an inference that in entering into the deed dated 1st April, 1950, Palaniswamy acted for and on behalf of all the partners of the Gnanam Match Works. Sharing of profits received by the named partners, with their partners, in the respective match factories may not, as I have already observed, by itself be a decisive circumstance. But that did not authorise the High Court to disregard the finding of the Tribunal on a question which was essentially one of fact. When the High Court observed that they were satisfied that the Tribunal had not correctly appreciated the evidence in arriving at the conclusion that each Match factory was the real party in the instrument of partnership, they assumed to themselves jurisdiction which they did not possess.

It was not the case of the assessee that there was no evidence on which the conclusion arrived at by the Tribunal could be founded, nor was it the case of the assessee that the conclusion was so perverse that no reasonable body of men properly instructed in the law could have arrived at that conclusion. It is also clear from the record that no such question was even canvassed before the Tribunal. Manifestly such a question could not arise out of the order of the Tribunal, and none such was referred to the High Court. By the question actually referred, the Tribunal sought the opinion of the High Court whether on the facts and circumstances refusal of the application for registration of the assessee was correct in law. If it was the case of the assessee that the conclusion of the Tribunal was based on no evidence, or that it was perverse, the High Court could be asked to call for a Reference from the Tribunal on that question. But that was never done.

It is true that the object of enacting S. 26-A and the Rules relating to the procedure for registration is to prevent escapement of liability to tax. But it is not necessary that before an order refusing registration is made, it must be established that there was evasion of tax attempted or actual. It is always open to a person, consistently with the law, to so arrange his affairs that he may reduce his tax liability to the minimum permissible under the law. The fact that the liability to tax may be reduced by the adoption of an expedient which the law permits, is wholly irrelevant in considering the validity of that expedient. But where the law prescribes conditions for obtaining the benefit of reduced liability to taxation, those conditions, unless otherwise provided, must be strictly complied with, and if they are not so complied with, the taxing authorities would be bound to refuse to give the tax-payer the benefit claimed. When application for registration of the firm is made, the Income-tax Officer is entitled to ascertain whether the names of the partners in the instrument are of persons who have agreed to be partners, whether the shares are properly specified and whether the statement about the shares is real or is merely a cloak for distributing the profits in a different manner. If all persons who have in truth agreed to be partners have not signed the deed or their shares were not truly set out in the deed of partnership, it would be open to the Income-tax Officer to decline to register the deed, even if under the general law of partnership the rights and obligations of the partners *eo nomine* thereto may otherwise be adjusted. As a corollary to this, if the requirements relating to the form in which the petition is to

be presented are not complied with and the relevant information is withheld, the Income-tax Officer may be justified in refusing registration.

In my view the High Court was in error in holding on the question submitted that the registration of the assessee under section 26-A of the Income-tax Act was wrongly refused.

The answer to the question referred to the High Court should be in the affirmative.

ORDER OF THE COURT :—In accordance with the opinion of the majority, the appeal is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J.C. SHAH AND S. M. SIKRI, JJ.

Kettlewell Bullen and Co., Ltd.

.. *Appellant**

v.

The Commissioner of Income-tax, Calcutta

.. *Respondent.*

Income-tax Act (XI of 1922), section 10—Capital receipt or revenue receipt—Relinquishment of managing agency rights—Compensation for—If Capital or revenue receipt.

The assessee was the managing agent of the company and under the terms and conditions of the agreement it was entitled to be the agents so long as it held certain minimum share holding, it can relinquish the rights on a proper notice, and the company was not obliged to pay any compensation for the voluntary resignation. The assessee was the managing agents for five other companies also. It had advanced monies to the company. The assessee, when it had the right to continue as the agents for five more years, in view of the financial position of the company, was persuaded to enter into an agreement with the managed company under which it surrendered its agency, on three considerations, viz. sale of shares held by the assessee at an agreed price, stipulation to discharge the liability of the company to repay the loans due by the company, and payment of compensation of Rs. 3,50,000 for the termination of the agency rights. For the assessment year 1953-54 the amount of compensation was added to the taxable income of the assessee by the Officer. In appeal the Assistant Commissioner excluded this amount on the basis that it was a capital receipt and this was confirmed in further appeal, to the Tribunal. The High Court, however, on a Reference at the instance of the Department, added this receipt as a revenue receipt. The assessee appealed to the Supreme Court on a certificate granted by the High Court.

Held, the question whether compensation received by an agent for premature determination of the contract of agency is a capital or a revenue receipt, is not capable of solution by the application of any single test, its solution must depend upon a correct appraisal in their true perspective of all the relevant facts.

Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being normal incident of the business and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue.

Where by the cancellation of any agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.

Held, on the facts, what the assessee was paid was to compensate him for loss of capital asset. It matters little whether the assessee did continue after the determination of its agency with the company in question, to conduct the remaining agencies. The transaction was not in the nature of a trading transaction, but was one in which the assessee parted with an asset of an enduring value.

Appeal from the Judgment and Order, dated 1st August, 1961, of the Calcutta High Court in Income-tax Reference No. 75 of 1956.

S. Chaudhuri, Senior Advocate (D. N. Mukherjee and D. N. Gupta, Advocates, with him), for Appellant.

K. N. Rajagopal Sastry, Senior Advocate (R. N. Sachthey, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The appellant is a public limited company, and has its registered office at Calcutta. By an agreement dated 1st May, 1925, the Fort William Jute Company, Ltd., appointed the appellant its managing agent upon certain terms and conditions set out therein. Under the agreement the appellant was to receive as managing agent remuneration at the rate of Rs. 3,000 per month, commission at the rate of ten per cent. of the profits of the company's working, additional commission at three per cent. on the cost price of all new machinery and stores purchased by the managing agent outside India on account of the company, and interest on all advances made by the managing agent to the company on the security of the company's stocks, raw materials and manufactured goods. The appellant and its successors in business, whether under the same or any other style or firm, unless they resigned their office were entitled to continue as managing agent until they ceased to hold shares in the capital of the company of the aggregate nominal value of Rs. 1,00,000 and were on that account removed by a special resolution of the company passed at an extraordinary meeting of the company, or until the managing agent's tenure was determined by the winding up of the company. In the event of termination of agency in the contingencies specified, the managing agent was to receive such reasonable compensation for deprivation of office, as may be agreed upon between the managing agent and the company and in case of dispute, as may be determined by two arbitrators. By clause 8, the managing agent was at liberty at any time to resign the office of managing agent by leaving at the registered office of the company previous notice in writing of its intention in that behalf. The agreement did not specify any period for which the managing agency was to endure. Since the successors of the appellant were also to continue as agents, unless they resigned or became disqualified, the duration was in a sense unlimited. But by virtue of section 37-A (2) of the Indian Companies Act, 1913, the appointment of the appellant as managing agent would expire on 14th January, 1977, i.e., on the expiry of twenty years from the date on which the Indian Companies (Amendment) Act, 1956, was brought into operation. Section 87-A (2), however, did not prevent the managing agent from being re-appointed after the expiry of that period.

Beside the managing agency of the Fort William Jute Co., Ltd., the appellant held at all material time managing agencies of five other limited companies, viz., Fort Gloster Jute Manufacturing Co., Ltd., Bowreach Cotton Mills Co., Ltd., Dunbar Mills, Ltd., Mothola Co., Ltd., and Joonktollee Tea Co., Ltd. The appellant had advanced Rs. 12,50,000 to the Fort William Jute Co., Ltd., on the security of the stocks, raw materials and manufactured goods of that company. The appellant held in 1952, 600 out of 14,000 ordinary shares of the face value of Rs. 100 each, and 6,920 out of 10,000 preference shares also of the face value of Rs. 100 each. On 21st May, 1952, the appellant entered into an agreement with M/s. Mugneeram Bangur & Co., the principal conditions of which were :

(i) M/s. Mugneeram Bangur & Co., to purchase the entire holding of shares of the appellant in the Fort William Jute Co., Ltd.—ordinary shares at Rs. 400 each and preference shares at Rs. 185 each and to make an offer to all holders of the company's shares—preference and ordinary—to purchase their holdings at the same rates :

(ii) M/s. Mugneeram Bangur & Co., to procure repayment on or before 30th June, 1952, of all loans made by the appellant to the principal company :

(iii) M/s. Mugneeram Bangur & Co., to procure that the principal company will compensate the appellant for loss of office in the sum of Rs. 3,50,000, such sum being payable to the appellant after it submitted its resignation of managing agent; and

(iv) M/s. Mugneeram Bangur & Co., to reimburse the company the amount payable to the appellant.

The reasons for which the appellant agreed to relinquish the managing agency were set out in a letter dated 28th May, 1952, addressed by the appellant to the members

question, but as often observed by the "highest authorities", it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have to be taken into account in reaching a decision. *Vide Van Den Berghs, Ltd. v. Clark*¹. That however, is not to say that the question is one of fact, for, as observed in *Davies (H. M. Inspector of Taxes) v. Shell Company of China, Ltd.*², "these questions between capital and income, trading profits or no trading profit, are questions which though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts".

The inter-relation of facts which have a bearing on the question propounded must therefore first be determined. The managing agency was not, except in the circumstances set out in clause 2 of the agreement, liable to be determined at the instance of the company before January 14, 1957, unless the appellant by giving notice of three weeks voluntarily resigned the agency. At the date of termination the agency had five more years to run, and the Companies Act did not prohibit renewal of the agency in favour of the appellant, after the expiry of the initial period of twenty years. The appellant company was formed for the object, amongst others (*vide* clause 3 (2) of the Memorandum of Association of the appellant) of carrying on the business of managing agencies. The appellant was entitled under the terms of the agreement to receive so long as the agency endured ten per cent of the profits of the company's working, three per cent on all purchases of stores and machinery abroad, and a monthly remuneration of Rs. 3,000. The appellant submitted its resignation in exercise of the power reserved under clause 8 of the managing agency agreement, but that resignation was its common ground part of the arrangement with M/s. Mugneeram Bangur & Co., dated May 21, 1952. Under the terms of the managing agency agreement, the principal company was not obliged to pay any compensation to the appellant for voluntary resignation of the agency, but in consideration of the appellant parting with its shareholding and submitting resignation of the managing agency so as to facilitate the appointment of M/s. Mugneeram Bangur & Co., as managing agent, the latter purchased the shareholding of the appellant, undertook to make available Rs. 3,50,000 for payment to the appellant and to discharge the debt due by the company to the appellant. Payment of Rs. 3,50,000 was therefore an integral part of an arrangement for transfer of managing agency. A managing agency of company is in the nature of a capital asset; that is not denied. It is true that it is not like an ordinary asset capable of being transferred from one person to another. Theoretically, the power to appoint or dismiss the managing agent may lie with the directors of the company, but in practice the power lies with the person or persons having a controlling interest in the shareholding of the company, M/s. Mugneeram Bangur & Co. were anxious to be appointed managing agents of the principal company; and for that purpose the appellant had to be persuaded to agree to a premature termination of its agency. This was secured for a triple consideration: sale of shares held by the appellant at an agreed price, stipulation to discharge the liability of the company to repay the loans due by the company, and payment of Rs. 3,50,000 as compensation for termination of the appellant's agency.

The High Court summarised the effect of the agreement between the appellant and M/s. Mugneeram Bangur & Co., as follows: The sum of Rs. 3,50,000 described as compensation for loss of office of the managing agent was part of the whole scheme incorporated in the agreement. Each clause of the agreement was a consideration of the other clauses and payment of compensation for the alleged loss of office did not, being part of the total scheme, stand by itself. Determination of the managing agency of the appellant was not compulsory cessation of business: it was a voluntary resignation for which under the agency agreement the appellant was not entitled to any compensation, but by the device of procuring a purchaser the appellant was doing "business of selling the managing agency and getting a profit and value for it which it otherwise could not have got." The High Court stamped this transaction with the nature and character of a trading or a business deal, because in their view the managing agency of a company—an institution peculiar to

1. (1935) 19 T.C. 290 : 1935 A.C. 431.

2. (1952) 22 I.T.R. (Supp.) 1.

Indian business conditions—which creates a managing agent as an *alter ego* of the managed company with authority to utilise the existing structure of the company's organisation to carry on business, earn profits, and in fact, virtually to trade in every possible sphere open to the company, may be regarded as circulating capital, where several managing agencies are conducted by an assessee. Therefore in the view of the High Court the compensation received for surrendering the agency was remuneration received on account of conducting the business, and was income. The judgment of the High Court proceeded substantially upon the following two grounds :

(1) that on the facts of the case, the managing agency held by the appellant of the Fort William Jute Co., Ltd., was a stock-in-trade ; and

(2) that the appellant was formed with the object of acquiring managing agencies, and in fact held managing agencies of as many as six companies. Earning profits by conducting the management of companies, being the business of the appellant, compensation received as consideration for surrendering the managing agency was a revenue receipt.

We are unable to agree with the High Court that the managing agency of the Fort William Jute Co., Ltd., was an asset of the character of stock-in-trade of the company. The appellant was formed with the object, among others, of acquiring managing agencies of companies and to carry on the business and to take part in the management, supervision or control of the business or operations of any other company, association, firm or person and to make profit out of it. That only authorised the appellant to acquire as a fixed asset, if a managing agency may be so described, and to exploit it for the purpose of profit. But there is no evidence that the company was formed for the purpose of acquiring and selling managing agencies and making profit by those transactions of sale and purchase. A managing agency is not an asset for which there is a market, for it depends upon the personal qualifications of the agent. Counsel appearing on behalf of the Commissioner conceded that the case that the managing agency was of the nature of stock-in-trade was not set up before the Tribunal, and he does not rely upon this part of the reasoning of the High Court in support of the plea that the compensation received by the appellant is a revenue receipt. He relies upon the alternative ground, and contends that the managing agency of the Fort William Jute Co., Ltd., was a part of the frame work of the business of earning profit by working as managing agent of different companies, and in the normal course, termination of employment by the principal companies of the appellant as managing agent being a normal incident of such business, compensation received by the appellant is not for loss of capital but must be regarded as a trading receipt, especially when the termination of the agency does not impair the structure of the business of the appellant.

In the present case there is a special circumstance which must first be noticed. In truth the amount of Rs. 3,50,000 was received by the appellant from M/s. Mugneeram Bangur & Co., in consideration of the former agreeing to forego the agency which it held and which M/s. Mugneeram Bangur & Co., were anxious to obtain. It was in a business sense a sale of such rights as the appellant possessed in the agency to M/s. Mugneeram Bangur & Co. This is supported by the recitals made in clause 2 of the agreement that if at any time within six months after the completion of *such sale* M/s. Mugneeram Bangur & Co. were unable to exercise the voting rights attached to the shares purchased by them, the appellant will appoint any person nominated by M/s. Mugneeram Bangur & Co., to attend and vote for them at any meeting of the company or the holders of any class of shares to be held within such period in such manner as M/s. Mugneeram Bangur & Co. may decide. The object underlying the agreement was therefore to transfer the managing agency to M/s. Mugneeram Bangur & Co., or at least to effectuate their appointment in place of the appellant as managing agent of the Fort William Jute Co., Ltd. All the stipulations and the covenants of the agreement, viewed in the light of the surrounding circumstances, do stamp the transaction as one of surrender of the rights of the appellant in the managing agency so that corresponding rights may arise in favour of M/s. Mugneeram Bangur & Co. It would be irrelevant

in considering the true nature of the transaction, to project the somewhat legalistic consideration that a managing agency is not transferable. It is because it is not directly transferable, that the arrangement incorporated in the agreement was effected. It would be difficult to regard such a transaction relating to a managing agency as a trading transaction.

Counsel for the assessee contended that even assuming that the form of the transaction under which for loss of the managing agency the appellant received compensation from the principal company is decisive, or has even a dominant impact, and the ultimate source from which the compensation was provided is to be ignored, the compensation received for loss of agency by the agent must always be regarded under the Indian Income-tax Act as capital receipt. In support of that contention Counsel placed strong reliance upon the Judgment of the Judicial Committee in *Commissioner of Income-tax v. Shaw Wallace & Co.*¹. In the alternative Counsel pleaded that even if the extreme proposition was not found acceptable, the right of the assessee in the managing agency of the principal company was to endure for another five years and which in the normal course would have continued for another twenty years was an enduring asset and consideration received by the appellant for extension of that asset was a capital receipt.

On behalf of the Income-tax Department it was contended that *Shaw Wallace & Co.'s case*¹, does not lay down any proposition of general application to compensation paid for determination of all agency contracts. It was further submitted that, having regard to the nature of the agreement and the voluntary resignation submitted by the assessee, no enduring asset remained vested in the assessee, and none was attempted to be transferred : the compensation directly paid by the principal company (which compensation was under the terms of the contract not payable was only a "measure of profit" which the appellant would, but for the resignation, have earned, and was therefore in the nature of revenue. It was also urged that compensation was not payable to the assessee when resignation of the managing agency was tendered under clause 8 of the agreement and therefore the amount sought to be brought to tax was received by the assessee in the course of a normal trading transaction of the assessee. Finally, it was urged that in any event, by the loss of the agency the framework of the business of the assessee was not at all impaired, and therefore also the compensation received must be regarded as revenue and not capital.

Whether a particular receipt is capital or income from business, has frequently engaged the attention of the Courts. It may be broadly stated that what is received for loss of capital is a capital receipt : what is received as profit in trading transaction is taxable income. But the difficulty arises in ascertaining whether what is received in a given case is compensation for loss of a source of income, or profit in a trading transaction. Cases on the border line give rise to vexing problems. The Act contains no real definition of income ; indeed it is a term not capable of a definition in terms of a general formula. Section 2 (6-C) catalogues broadly certain categories of receipts which are included in income. It need hardly be said that the form in which the transaction which gives rise to income is clothed and the name which is given to it are irrelevant in assessing the exigibility of receipt arising from a transaction to tax. It is again not predicated that the income must necessarily have a recurrent quality. We are not called upon to enter upon an extensive area of enquiry as to what receipts may be regarded as income generally, but merely to consider in this case whether receipt of compensation for surrendering the managing agency may be regarded as capital or as revenue. In the absence of a statutory rule, payment made by an employer in consideration of the employee releasing him from his obligations under a service or agency agreement or a payment made voluntarily as compensation for determination of right to office arises not out of employment, but from cessation of employment and may not generally constitute income chargeable under sections 10 and 12. It may be mentioned that this

rule has been altered by the Legislature by the enactment of section 10 (5-A) by the Finance Act of 1955, which provides that compensation or other payment due to or received by a managing agent of an Indian company at or in connection with the termination or modification of his managing agency agreement with the company, or by a manager of an Indian company at or in connection with the termination of his office or modification of the terms and conditions relating thereto, or by any person managing the whole or substantially the whole affairs of any other company in the taxable territories at or in connection with the termination of his office or the modification of the terms and conditions relating thereto, or by any person holding an agency in the taxable territories for any part of the activities relating to the business to any other person, at or in connection with the termination of his agency or the modification of terms and conditions relating thereto, shall be deemed to be profits and gains of a business carried on by the managing agent, manager or other person, as the case may be, and shall be liable to tax accordingly. But this amendment was made under the Finance Act, 1955, with effect from April 1, 1955, and has no application to the present case.

The Indian Income-tax Act is not in *pari materia* with the English Income-tax Statutes. But the authorities under the English law which deal not with the interpretation of any specific provision, but on the concept of income, may not be regarded as proceeding upon any special principles peculiar to the English Act so as to render them inapplicable in considering problems arising under the Indian Income-tax Act. It is well settled in England that money paid to compensate for loss caused to an assessee's trade is normally regarded as income. In *Short Bros., Ltd. v. The Commissioner of Inland Revenue*¹, a sum received as compensation for loss resulting from cancellation of a contract was held to be revenue in the ordinary course of the assessee's trade, and liable to excess profits duty. Similarly in *The Commissioners of Inland Revenue v. The Northfleet Coal and Ballast Co., Ltd.*², compensation paid by a person who had agreed to purchase a certain quantity of chalk yearly for ten years, from a company which was the owner of a quarry, in consideration of being relieved of his liability under the contract was held chargeable to excess profits duty as trading profit in the hands of the company.

In *The Commissioners of Inland Revenue v. Newcastle Breweries Ltd.*³, compensation received under an order of the War Compensation Court, under the Indemnity Act, 1929, in addition to what was paid by the Admiralty for rum taken over in exercise of the power under the Defence of the Realm Regulations was held to be revenue.

In *Ensign Shipping Co., Ltd. v. The Commissioners of Inland Revenue*⁴, an amount paid by the Government to a ship-owner to compensate him for loss resulting from detention of his ships during a coal-strike, and for wages etc. was held liable to excess profits duty. Again as held in *Burmah Steamship Co., Ltd. v. Commissioners of Inland Revenue*⁵, money received by a ship-owner from a firm of ship-builders to compensate for loss resulting from the failure by the latter to complete repairs to ship within the stipulated period was regarded as revenue.

These cases illustrate the principle that compensation for injury to trading operations, arising from breach of contract or in consequence of exercise of sovereign rights, is revenue. These cases must, however be distinguished from another class of cases where compensation is paid as a solatium for loss of office. Such compensation may be regarded as capital or revenue: it would be regarded as capital, if it is for loss of an asset of enduring value to the assessee, but not where payment is received in settlement of loss in a trading transaction.

In *Chibbet v. Joseph Robinson and Sons*⁶, the assessee who were ship-managers employed by a steamship company under a contract which provided that they should be paid a percentage of the company's income, were paid compensation for loss

1. (1927) 12 T.C. 955.

2. (1927) 12 T.C. 1102.

3. (1925) 12 T.C. 927.

4. (1928) 12 T.C. 1169.

5. (1931) 16 T.C. 67.

6. (1924) 9 T.C. 48.

of office in anticipation of liquidation of the steamship company. It was held that payment to make up for loss resulting from cessation of profits from employment was not itself an annual profit, but was payment in respect of termination of employment and was not assessable to tax.

In *Du Cross v. Ryall*¹, the assessee settled a claim made by his employee for damages for wrongful dismissal and paid £57,250 as compensation for wrongful dismissal. It was held that no part could be apportioned to salary and commission and the whole escaped assessment.

In *Duff v. Barlow*², the managing director of the appellant company who was employed for a period of ten years was asked by it to manage the business of one of its subsidiaries, and to receive a percentage of profits made by the subsidiary. The employment was terminated by mutual agreement two years after its commencement and £4,000 were paid as compensation to the managing director for loss of his rights of future remuneration. This was held not taxable, because it was a sum paid as compensation for loss of a source of income and hence a capital asset. This case was followed in *Honley v. Murray*³, where the appellant employed as a managing director of a property company under a service agreement which was not determinable till March 31, 1944, was also appointed a director of a subsidiary company. At the request of the Board of Directors of the property company the appellant resigned his office in the property company as well as its subsidiary and received from the property company an amount equal to the remuneration which he would, under the agreement, have been entitled to, if his appointment had not been determined. It was held by the Court of Appeal that the use of the expression "compensation for loss of office" was not the determining factor when the bargain itself stood cancelled, and the sum paid was in consideration of total abandonment of all contractual rights which the other party had. The receipt was in the circumstances not taxable. The payment was not voluntarily made. The bargain was that the appellant should resign and in consideration thereof, the company should make the payment.

In *Barr, Crombie & Co., Ltd. v. Commissioners of Inland Revenue*⁴, the appellant company managed the ships of another company under an agreement for a period of fifteen years. The shipping company went into liquidation and a sum exceeding £16,000 was paid to the appellant company for the eight years which were still to run to the date of expiry of the agreement. Over a period upwards of sixteen years only two per cent of the appellant company's income was derived from other managements, and on the liquidation of the shipping company the appellant company lost its entire business except for some abnormal and temporary business. It was held by the Court of Session in Scotland that the sum in question was not a trading receipt of the appellant company. Lord President Normand observed :

"In the present case virtually the whole assets of the Appellant Company consisted in this agreement. When the agreement was surrendered or abandoned practically nothing remained of the Company's business. It was forced to reduce its staff and to transfer into other premises, and it really started a new trading life. Its trading existence as practised upto that time had ceased with the liquidation of the shipping Company."

These cases establish the distinction between compensation for loss of a trading contract and solatium for loss of the source of income of the assessee.

But payment of compensation for loss of office is not always regarded as capital receipt. Where compensation is payable under the terms of the contract which is determined, payment is in the nature of revenue and therefore taxable. For instance in *Henry v. Foster*⁵, it was held that when compensation stipulated under a contract is paid for loss of office, it is taxable under Schedule 'E' and it was also held in *Dale v. D. E. Soissans*⁶, that compensation paid under an agreement to an Assistant of the managing director for premature termination of employment was held to be income. The principle on which these cases proceed-

1. (1938) 19 T.C. 444.

2. (1941) 23 T.C. 633.

3. 31 T.C. 351.

4. (1945) 26 T.C. 406.

5. (1931) 16 T.C. 605 ; 145 L.T. 225.

6. (1950) 2 A.E.R. 460.

ed, was also applied by the Court of Session in Scotland in *Kelsall Parsons and Co. v. Commissioners of Inland Revenue*¹, to a case in which there was no express term for payment of compensation on termination of employment. The appellants in that case carried on business as agents on a commission basis for sale in Scotland for products of various manufacturers, and entered into agency agreement for that purpose. At the instance of the manufacturer concerned one of the agreements which was for a period of three years was terminated at the end of the second year in consideration of a payment of £1,500. It was held by the Court of Session that no capital asset of the assessee was depreciated in value or became of less use for the purpose of the assessee's business. The sum paid was accordingly included in the calculation of the taxable profits for the year in which it was received. Lord President Normand observed at page 620.

"We are not embarrassed here by the kind of difficulties which arise when, by agreement, a benefit extending over a tract of future years is renounced for a payment made once and for all. The sum paid in this case is really and substantially a surrogatum for 'one year's profits.'"

The foundation of the distinction made in *Kelsall Parsons & Co. v. Commissioner of Inland Revenue*¹, *Henry v. Foster*² and *Dale v. D. E. Soissons*³, is to be found in the observations made by Lord Macmillan in *Van Den Berghs, Ltd. v. Clark*⁴. In that case two companies which were manufacturers of margarine and similar products entered into an agreement with a view to end competition between them and to work in friendly alliance and to share the profits and losses in accordance with an elaborate scheme. This arrangement was terminated by mutual agreement in consideration of the payment by the Dutch Company of £4,50,000 to the appellant company as damages. It was held by the House of Lords that the amount was received by the appellant as payment for cancellation of the appellant company's future rights under the agreements, which constituted a capital asset of the company, and that it was a capital receipt. Lord Macmillan observed at page 431.

"Now what were the appellants giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the States case "pooling agreements" but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the Appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years, the lump sum might be regarded as of the same nature as the ingredients of which it was composed. But even if a payment is measured by annual receipts, it is not necessarily in itself an item of income.

Cases which have lately arisen before the Courts in the United Kingdom have elaborated this distinction. In *Commissioner of Inland Revenue v. Fleming and Co.*⁵, the Court of Session held, following *Kelsall Parsons & Co., case*¹, that compensation paid to the assessee who 'carried on business as manufacturers' agent and general merchants and had acted as the sole agents since 1903 for certain products of the manufactures, for termination in 1948 of the agency at the instance of the manufacturer was regarded as revenue. In the view of Lord President Cooper the cases relating to determination of agencies, broadly speaking, fell on two sides of the line drawn in the light of the varying circumstances:

(a) "the cancellation of a contract which affects the profit-making structure of the recipient of compensation and involves the loss of an enduring trading asset", and

(b) "the cancellation of a contract which does not affect the recipient's trading structure nor deprive him of any enduring trading assets, but leaves him free to devote his energies and organisation released by the cancellation of the contract to replacing the contract which has been lost by other like contracts",

and held that the case fell within the second class, and not the first.

In *Wiseburgh v. Domville*⁶, the appellant had entered into an agreement in 1942 under which he acted as sole agent for the manufacturer. In 1948 when this agreement could have been determined by notice expiring in October, 1949, the manufacturer dismissed him. The appellant received £4,000 as damages for breach of

1. (1938) 21 T.C. 608.

2. (1931) 16 T.C. 605 : 145 L.T. 225.

3. (1950) 2 A.E.R. 416.

4. (1935) 19 T.C. 390 : 1935 A.C. 431.

5. (1952) 33 T.C. 57.

6. (1956) 36 T.C. 527 : (1956) 1 All E.R. 754.

agreement. The appellant had several agencies from time to time as agents and it was one of the incidents of agency business that one agency may be stopped and another may come and it being normal incident of the kind of business that the appellant was doing, that an agency should come to an end, compensation paid was regarded as income on the principle laid down in *Kelsall Parsons and Co.'s case*¹.

In another case which soon followed *Anglo-French Exploration Co., Ltd. v. Claysons*², the appellant company carried on business, among others, as secretary and agent for a number of other companies. A South African Company appointed the appellant company as its secretary and agent at a remuneration of £1,500 per annum under a contract terminable at six months' notice. Under an arrangement with the purchaser of the controlling interest of the shareholders under which the appellant company was to resign its office as secretary and agent of the South African Company, an amount of £20,000 received by the appellant company was held by the Court of Appeal to be in the nature of a trading receipt.

In *Blackburn v. Close Bros., Ltd.*³ the respondent company carried on business of merchant bankers and of a finance and issuing house and derived income in the form of allowances for performing managerial and a secretarial services. Following a dispute with one 'S' for which the respondent company had agreed to provide secretarial services for three years at a remuneration of £8,000 per annum, the agreement was terminated within about 2½ months from the date of its commencement. £15,000 received by the respondent company as compensation for termination of the agreement was held to be a trading receipt. Pennycuik, J., held that the contract was one of a number of ordinary commercial contracts for rendering services by the assessee in the course of carrying on its trade, and therefore the sum received on the cancellation of the agreement was a receipt of a revenue nature.

It is manifest that the principle broadly stated in the earlier cases, that compensation for loss of office, or agency, must be regarded as a capital receipt, has not been approved in later cases. An exception has been engrafted upon that principle that where payment even if received for termination of an agency agreement, but the agency is one of many which the assessee holds, and the termination of the agency does not impair the profit-making structure, but is within the framework of the assessee's business, it being a necessary incident of the business that existing agencies may be terminated and fresh agencies may be taken, the receipt is revenue and not capital.

A case on the other side of the line may be noticed : *Sabine v. Lookers, Ltd.*⁴ Under agreements, annually renewed with the manufactures, the respondent company had acted for many years as their main distributors in the Manchester area of the manufacturer's products, which it bought for re-sale. The respondent had sunk considerable sums in fixtures and equipment specially designed for the trade of wholesale dealers and carried a large stock of spare parts mainly for wholesale sale. The whole of the trade of the respondent was geared to the display, sale, service and repairs of the manufacturer's products. Up to 1952 inclusive, the manufacturers had included in its agreements with distributors a standard "continuity clause" giving the distributors, on certain conditions, the option of renewal for a further year. But in 1953, the manufacturers, adopted a new standard agreement, containing a new continuity clause which the respondent company regarded as giving it less security than before. As compensation for loss resulting from the alterations, the manufacturers paid to the respondent company, a sum calculated on sales to the trade during the contract period. It was held that this was a capital receipt, because by the modification the framework of the respondent's business was impaired.

Elaborate arguments were presented before us on the decision of the Judicial Committee in *Shaw Wallace & Co.'s case*⁵. The appellant contended that *Shaw Wallace's case*⁵, laid down a principle of general application applicable to all cases

1. (1938) 21 T.C. 608.

2. (1955) 36 T.C. 545 : (1955) 3 All E.R. 779.

3. 39 T.C. 164.

4. 38 T.C. 120.

5. (1932) 63 M.L.J. 124 : L.R. 59 I.A. 206 (P.C.).

of compensation received from the principal as solatium for determination of the contract of agency. Counsel for the Revenue contended that the principle should be restricted to its special facts, and cannot be extended in view of the later decisions. It is necessary to closely examine the facts which gave rise to that case. Shaw Wallace & Company carried on business as merchants and agents of various companies and had branch offices in different parts of India. For a number of years they acted as *distributing agents* in India for the Burma Oil Company and the Anglo-Persian Oil Company; but without a formal agreement with either company. The two Oil Companies having combined decided to make other arrangements for distributing their products. Each Company terminated its contract with Shaw Wallace & Company and paid compensation to it, which aggregated to Rs. 15,25,000. This amount, subject to certain allowances was sought to be assessed to income-tax under sections 10 and 12. The High Court of Calcutta held that the compensation received by the assessee was a capital receipt. In appeal to His Majesty-in-Council the decision of the High Court was affirmed.

The Judicial Committee declined to seek inspiration from the English decisions cited at the Bar. The Board observed that the expression "income" which is not defined in the Act connotes a periodical monetary return coming in with some sort of regularity, or expected regularity, from definite sources; the source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. They further observed that the income chargeable under head (iv) of section 6 "business" read with section 10 is to be in respect of the profits and gains of any business carried on by the assessee, and therefore the sums which the Income-tax Department sought to charge could only be taxable if they were the produce of the result of carrying on the agencies of the Oil Companies in the year in which they were received by the assessee. But when once it was admitted that they were sums received, not for carrying on this business, but as some sort of solatium for its compulsory cessation, the answer seemed fairly plain. The Board observed that if compensation received for sale of the business or its goodwill was capital, the same reasoning ought to apply when the sum received was in the nature of a solatium for cessation of a part of the business, and it was a matter of no consequence that the assessee continued to pursue its other independent commercial interests, and profits from which were taxed in the ordinary course, for the sums sought to be taxed had no connection with the continuance of the assessee's other business: the profits earned by the assessee, it was observed, were "the fruit of a different tree, the crop of a different field", and if under section 10 the compensation was not taxable, it was not taxable under section 12 under the head "other sources" as well.

The judgment of the Board proceeds upon the ground that compensation received *not for* carrying on the business but as solatium for its compulsory cessation, would be regarded as capital receipt, and for the application of this principle, existence of other independent commercial interests out of which profits were earned by the assessee was irrelevant. Two comments may be made at this stage. It cannot be said as a general rule, that what is determinative of the nature of the receipt is extinction or compulsory cessation of an agency or office. Nor can it be said that compensation received for extinction of an agency may always be equated with price received on sale of goodwill of a business. The test, applicable to contracts for termination of agencies is: what has the assessee parted with in lieu of money or money's worth received by him which is sought to be taxed? If compensation is paid for cancellation of a contract of agency, which does not affect the trading structure of the business of the recipient, or involves loss of an enduring asset, leaving the tax-payer free to carry on his trade released from the contract which is cancelled, the receipt will be a trading receipt: where the cancellation of a contract of agency impairs the trading structure, or involves loss of an enduring asset, the amount paid for compensating the loss is capital.

The view expressed by the Judicial Committee has with un-
proval in later cases. Lord Wright in *Raja Bahadur* i Nar

*Ramgarh v. Commissioner of Income-tax, Bihar and Orissa*¹, observed that it is incorrect to limit the true character of income, by such picturesque similies like "fruit of a different tree, or crop of a different field." Again it cannot be said generally that compensation for every transfer or determination of a contract of agency is capital receipt; *Kelsall Parsons & Co. v. Commissioners of Inland Revenue*², *Commissioners of Inland Revenue v. Fleming and Co.*³, *Wiseburgh v. Domville*⁴, and *Commissioner of Income-tax and Excess Profits Tax, Madras v. South India Pictures, Ltd.*⁵. Nor is it true to say that where an assessee holds several agency contracts each agency contract cannot without more be regarded as independent of the other contracts, and income received from each contract cannot always be regarded as unrelated to the rest of the business continued by the assessee. The decision in *Shaw Wallace Co.'s case*⁶, cannot therefore be read to yield the principle that compensation for loss of an agency may in all cases be regarded as capital receipt. Nor does it lay down that where the assessee has several lines of business line must in ascertaining the character of compensation for loss of a line of business be deemed an independent source. This view is exemplified by decisions of this Court and a decision of the Madras High Court. In the *South India Pictures, Ltd.'s case*⁷, compensation received for determination of the distribution rights of films was held taxable. After the assessee had exploited partially its right of distribution of cinematographic films to which it was entitled under the terms of agreements under which he had advanced money to the producers, the agreements were cancelled and the producers paid an aggregate sum of Rs. 26,000 to the assessee towards commission. It was held by Das, C.J., and Venkatarama Aiyar, J., (Bhagwati J., dissenting) that the sum paid to the assessee was not compensation for not carrying on its business, but was a sum paid in the ordinary course of business to adjust the relations between the assessee and the producers, and was taxable. Similarly in *Rai Bahadur Jairam Valji's case*⁸, a contract for the supply of limestone and dolomite was terminated when the purchaser, the Bengal Iron Company, Ltd., found the rates uneconomical. A suit was then filed by the respondent for specific performance of the contract and for an injunction restraining the company from purchasing limestone and dolomite from any other person. A fresh agreement made between the respondent and the company fell through because of circumstances over which the parties to the agreement had no control. The company then agreed to pay Rs. 2,50,000 to the respondent as solatium, besides the monthly instalments of Rs. 4,000 remaining unpaid under the contract of 1940. The Income-tax Department sought to bring to tax the amount of Rs. 2,50,000 and the balance due towards the monthly instalments of Rs. 4,000. It was held by this Court that the sum of Rs. 2,50,000 was not paid to the respondent as compensation for expenses laid out for works at the quarry of a capital nature and could not be held to be a capital receipt on that account, the agreements were merely adjustments made in the ordinary course of business. There was in the view of the Court no profit-making apparatus set up by the agreement of 1941, apart from the business which was to be carried on under it and there was at no time any agreement which operated as a bar to the carrying on of the business of the respondent and therefore the receipt of Rs. 2,50,000 was chargeable to tax. Venkatarama Aiyar, J., observed, in an agency contract the actual business consists of dealings between the principal and his customers, and the work of the agent is only to bring about the business: What he does is not the business itself, but something which is intimately and directly linked up with it. The agency may, therefore, be viewed as the apparatus which leads to the business rather than the business itself. Considered in this light the agency right can be held to be of the nature of a capital asset invested in business. But this cannot be said of a contract entered into in the ordinary course of business.

1. L.R. 70 I.A. 180:(1943) 2 M.L.J. 410.
 2. (1938) 21 T.C. 608.
 3. (1952) 33 T.C. 57.
 4. (1956) 36 T.C. 527:(1956) 1 All E.R. 754.
 5. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.)
 21 : (1956) S.C.R. 223.

6. (1932) 63 M.L.J. 124 (P.C.): L.R. 59
 I.A. 206.

7. (1956) S.C.J. 472:(1956) 2 M.L.J. (S.C.)
 21 : (1956) S.C.R. 223.

8. (1959) S.C.J. 284 : (1959) 1 M.L.J. (S.C.)
 116 : (1959) 1 An.W.R. (S.C.) 116.

Such a contract is part of the business itself, not something outside it, and any receipt on account of such a contract can only be a trading receipt. Because compensation paid on the cancellation of a trading contract differs in character from compensation paid for cancellation of an agency contract, it should not be understood that the latter is always, and as a matter of law, to be held to be a capital receipt. An

“agency contract which has the character of a capital asset in the hands of one person may assume the character of a trading receipt (asset) in the hands of another, as for example, when the agent is found to make a trading agencies and dealing with them.”

Therefore, when the question arises whether the payment of compensation for termination of an agency is a capital or a revenue receipt, it must be considered whether the agency was in the nature of a capital asset in the hands of the agent, or whether it was only part of his stock-in-trade. The learned Judge also observed that payments made in settlement of rights under a trading contract are trading receipts and are assessable to revenue, but where a trader is prevented from doing so by external authority in exercise of a paramount power and is awarded compensation therefor, whether the receipt is a capital receipt or a revenue receipt will depend upon whether it is compensation for injury inflicted on a capital asset or on stock-in-trade.

In *Peirce Leslie & Co., Ltd. v. Commissioner of Income-tax, Madras*¹, the assessee company took up managing agencies of several plantation companies. The managing agencies were liable to termination, but the assessee was entitled to compensation by the terms of the agreement. The Talliar Estates, Ltd., was one of the companies managed by the assessee. The agreement was a composite agreement about the managing agency rights and certain other rights. When the Talliar Estates, Ltd., went into liquidation the assessee received Rs. 60,000 by way of compensation for loss of office and the question arose whether that amount was income in the hands of the assessee. The Madras High Court held that the loss of one of several managing agencies had little effect on the structure of the assessee's business even in tea or on its profit-earning apparatus as a whole and the termination of the agreement with the Talliar Estates could well be said to have been brought about in the ordinary course of business of the assessee and therefore the amount received was a trading receipt.

In the *South India Pictures, Ltd.'s case*² : *Rai Bahadur Jairam Valji's case*³ and *Pierce Leslie Companies case*¹, it was held that the receipt of compensation for loss of agency was in the nature of revenue. In the *South India Pictures, Ltd.'s case*², the amount received was not compensation for not carrying on its business, but was a sum paid in the ordinary course of business to adjust the relations between the assessee and the producers : the termination of the agreements did not radically or at all affect or alter the structure of the assessee's business, and the amount received by the assessee was only so received towards commission, i.e., as compensation for the loss of commission which it would have earned, had the agreements not been terminated. Therefore, the amount was not received by the assessee as the price of any capital assets sold or surrendered or destroyed, but the amount was simply received by the assessee in the course of its going distributing agency business and therefore it was an income receipt. In that case the majority of the Court held on three distinct grounds, viz., (i) that the assessee did not part with any capital asset ; (ii) that the amount was received in the course of the distributing agency business which was continued ; and (iii) that the termination of the agreements did not radically or at all affect or alter the structure of the assessee's business, that the sum received was revenue. *Rai Bahadur Jairom Valji's case*³, was one of compensation received for termination of a trading contract. In *Peirce Leslie & Company's case*¹, there was termination of office, but it was held to be brought about in the ordinary course of the trading operations of the assessee.

1. (1960) 2 M.L.J. 1 : A.I.R. (1960) Mad. 137.
2. (1956) S.C.J. 479 : (1956) 2 M.L.J. (S.C.)
21 : (1956) S.C.R. 223.

3. (1959) S.C.J. 284 : (1959) 1 M.L.J. (S.C.)
116 : (1959) 1 An.W.R. (S.C.) 116.

On the other side of the line are cases of *Commissioner of Income-tax, Hyderabad-Deccan v. Vazir Sultan and Sons*¹ and *Godrej & Co. v. Commissioner of Income-tax, Bombay City*². In *Vazir Sultan & Sons' case*¹, the majority of the Court held that compensation paid for restricting the area in which a previous agency agreement operated was a capital receipt, not assessable to income-tax. It was held that the agency agreements were not entered into by the assessee in the carrying on of their business, but formed the capital asset of the assessee's business which was exploited by the assessee by entering into contracts with various customers and dealers in the respective territories; it formed part of the fixed capital of the assessee's business and was not circulating capital or stock-in-trade of their business and therefore payment made by the company for determination of the contract or cancellation of the agreement was a capital receipt in the hands of the assessee.

In *Godrej & Co.'s case*², the managing agency agreement in favour of the assessee of a limited company which was originally for a period of thirty years and under which the assessee was entitled to a commission at certain rates was modified and remuneration payable to the managing agents was reduced. As compensation for agreeing to this reduction, the assessee received Rs. 7,50,000 which was sought to be taxed as income in the hands of the assessee. This Court held, having regard to all the attending circumstances, that the amount was paid not to make up the difference between the higher remuneration and the reduced remuneration, but in truth as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be; so far as the assessee firm was concerned it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt.

On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed. Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue: Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.

In the present case, on a review of all the circumstances, we have no doubt that what the assessee was paid was to compensate him for loss of a capital asset. It matters little whether the assessee did continue after the determination of its agency with the Fort William Jute Co., Ltd., to conduct the remaining agencies. The transaction was not in the nature of a trading transaction, but was one in which the assessee parted with an asset of an enduring value. We are, therefore, unable to agree with the High Court that the amount received by the appellant was in the nature of a revenue receipt.

We accordingly record the answer on the question submitted by the Tribunal in the negative. The appellant would be entitled to its costs in this Court.

V.S.

Appeal allowed.

1. (1960) S.C.J. 1177: (1959) 2 S.C.R. (Supp.) 375: (1960) 2 An.W.R. (S.C.) 73: (1960) 2 M.L.J. (S.C.) 73.

2. (1960) S.C.J. 166: (1960) 1 S.C.R. 527: (1960) 1 M.L.J. (S.C.) 55: (1960) 1 An.W.R. (S.C.) 55.

THE SUPREME COURT OF INDIA

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

M/s. Gillanders Arbuthnot and Company, Limited

.. Appellant*

v.

The Commissioner of Income-tax, Calcutta

.. Respondent.

Income-tax Act (XI of 1922) Section 10—Capital Receipt or Revenue Receipt—Assessee, sole distribution agent—Termination of agency rights—Compensation on the basis of profits—No impairment of trading structure.

The assessee carried on business in diverse lines, buying and selling on its own account, introducing customers to principals, acting as managing agents, as shipping agents, purchasing agents, as secretaries, and acting as sole importers and distributors on behalf of foreign principals. G. & Co., were formerly the sole selling agents for the principal company in question from 1886, and the rights were terminable at the option of the company. The assessee was incorporated for taking over the agency from G & Co. In 1945 the principal company set up its own organization for distributing its products and terminated the rights of the assessee from 1st April, 1948, on payment of compensation to the assessee computed on the basis of the actual sales, for the first three post-transfer years. The assessee received a sum of about rupees nine lakhs as compensation. This amount was held to be taxable by the Officer, under the Income-tax Act and the Business Profits Tax Act for the chargeable accounting period ending 31st March, 1949. The Assistant Appellate Commissioner held it was not so taxable, and the Tribunal held it was taxable as a revenue receipt. The High Court on a Reference confirmed the order of the Tribunal. The assessee appealed to the Supreme Court on a certificate granted by the High Court,

Held : The amount was taxable as a revenue receipt.

There is no immutable principle that compensation received on cancellation of any agency must always be regarded as capital. In each case the question has to be determined in the light of the attendant circumstances.

It cannot be disputed that compensation paid for agreeing to refrain from carrying on competitive business in the commodities in respect of which the agency was terminated, or for loss of goodwill would, *prima facie*, be of the nature of a capital nature. But there is no evidence that compensation was paid to the assessee in the instant case as consideration for giving the undertaking not to carry on a competitive business, or as compensation for loss of goodwill.

The compensation paid to the assessee was computed on the basis of the profits of the business. Having regard to the vast array of business done by the assessee as agents, the acquisition of agencies was in the normal course of business and determination of individual agencies a normal incident, not affecting or impairing the trading structure of the assessee. The assessee was compensated by payment to it for the loss of profits it suffered by the cancellation of its agency, leaving it free to conduct its remaining business.

Assuming that the agency in the explosives may not be replaced, that circumstance by itself may not justify the inference that the agency was independent of the other lines of business conducted by the assessee, or that by the cancellation of the agency an enduring asset was lost to the assessee.

Appeals from the Judgment and Order dated 10th January, 1962, of the Calcutta High Court in Income-tax Reference No. 33 of 1957.

B. Sen, Senior Advocate (P. K. Chatterjee and D. N. Gupta, Advocates, with him), for Appellant.

K. N. Rajagopal Sastri, Senior Advocate (R. N. Sachthey, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Shah, J.—The appellant which is a public limited company incorporated under the Indian Companies Act, 1913, has its registered office at Calcutta, and branches in Bombay, Madras, New Delhi and Kanpur. The appellant carried on business in diverse lines, which may broadly be classified as (1) buying and selling on its own account, (2) introducing customers to principals (3) acting as managing agents, (4) acting as shipping agent, (5) acting as purchasing agents, (6) acting as sole importers and distributors on behalf of United Kingdom principals having no organisation in India and (7) acting as secretaries.

Since, 21st January, 1886, M/s. Gillanders Arbuthnot & Co., predecessors-in-interest of the appellant were the sole agents and distributors in India of explosives manufactured by the Imperial Chemical Industries (Export) Ltd., Glasgow, Scotland

hereinafter 'called the principal company'. There was no written agreement between the principal company and M/s. Gillanders Arbuthnot & Co., incorporating the terms of the agency agreement. It is however common ground that the agency agreement was terminable at the option of the principal company. The appellant was incorporated for taking over the business of M/s. Gillanders Arbuthnot & Co., and since it took over the distributing agency the appellant acted as the sole agent and distributor of explosives manufactured by the principal company, but without a written agreement.

In May, 1945, the principal company desired to set up its own organisation for distributing its products, and intimated the appellant that the agency of the appellant may be cancelled after two or three years. By letter dated 11th March, 1947, the principal company informed the appellant that the agency will stand terminated from 1st April, 1948, and that it desired to compensate the appellant for termination of the agency on the following basis :

"(1) For the first three post-transfer years" the principal company shall pay to the appellant two-fifths of the commission accrued on actual sales in the territory of the latter's agency taken over by the principal company, such commission to be computed at the commission rates formerly paid to the appellant ;

(2) That "in the third post-transfer year", the principal company shall pay the appellant in addition a sum equivalent to full commission on the sales for that year effected by the principal company in the appellant's territory calculated at the same rates.

(3) That payments would be made to the appellant after the end of each year as soon as the amount due was ascertained.

Certain other matters in the letter which have a bearing on the dispute, may be reproduced :

"For the purpose of calculating the commission due to you, the post-transfer will be deemed to run as from the date of the transfer of your agency to Imperial Chemical Industries (India) Ltd. We trust that you will find these proposals acceptable.

As a condition of our paying you compensation on the basis outlined above, we would request you to be good enough to give us a formal undertaking to refrain from selling or accepting any agency for explosives or other commodities competitive with those covered by the agency agreement now being terminated.

In this connection, we are asking our Legal Department to prepare a formal agreement which we will submit to you for signature as soon as possible.

It is common ground that no formal agreement in writing, which was contemplated to be taken from the appellant, was executed, not even a draft of the agreement was submitted by the principal company to the appellant.

Pursuant to conditions (1) and (2) incorporated in the letter dated 11th March, 1947, which have been set out earlier, the appellant received the following amounts from the principal company :

For the previous year corresponding to the assessment year ending .. Rs. 1,53,471/11/
31st March, 1949

For the previous year corresponding to the assessment year ending .. Rs. 1,59,271/4/
31st March, 1950.

For the previous year corresponding to the assessment year ending .. Rs. 6,20,131/2/
31st March, 1951.

These amounts were included in its profit and loss account by the appellant as commission received by it. But in the course of the proceedings for assessment to income-tax and Business Profits Tax, the appellant claimed that the amounts were compensation received on determination of the agency being receipts of a capital nature and were not liable to be included in the total income of the appellant. The Income-tax Officer, Companies District IV, Calcutta, rejected the contention of the appellant, holding that cancellation of a single contract of agency out of a number of selling agencies held by the appellant was in the ordinary course of business and the sums received by the appellant as compensation for cancellation were revenue, taxable under the Indian Income-tax Act, 1922. The Income-tax Officer also assessed the relevant amount of compensation to Business Profits Tax for the chargeable accounting period ending, 31st March, 1949.

In appeal to the Appellate Assistant Commissioner, the contention of the appellant was accepted principally on the ground that the amounts received by the appellant were compensation for termination of the agency with the principal company and as consideration for agreeing to refrain from carrying on in future competitive business in explosives. The Appellate Tribunal held that the compensation received by the appellant was merely incidental to the carrying on of the business. The Tribunal negatived the contention of the appellant that the explosives agency was a separate business or that termination of that business amounted to loss of an enduring asset. The Tribunal also held that the covenant referred to in the letter dated 11th March, 1947, about the appellant agreeing to refrain from carrying on a competitive business in explosives did not form consideration for the amount paid, because although proposed in the letter dated 11th March, 1947, there was no formal acceptance of the offer or an undertaking in writing given by the appellant agreeing not to carry on a competitive business. In the view of the Tribunal the offer relating to the undertaking not to carry on a competitive business contained in the letter was not accepted, and the amounts paid by the principal company could not therefore be regarded as forming consideration partially or wholly for acceptance of that offer.

The tribunal thereafter referred three questions under section 66 (1) of the Indian Income-tax Act, 1922 to the High Court of Judicature at Calcutta. These questions were :

“(1) Whether the assessee’s agency of the Imperial Chemical Industries (Exports) Ltd., was a separate business by itself, the closure of which resulted in the destruction of a capital asset of the assessee ;

(2) Whether on the facts and in the circumstances of this case, the compensation sums received by the assessee from the Imperial Chemical Industries (Exports) Ltd., are income chargeable in the hands of the assessee ; and

(3) Whether on the facts and in the circumstances of this case no part of the compensation money was received by the assessee on the condition not to carry on a competitive business in the same line of activity in explosives and as such no part of the money was in the nature of capital being exempt from Indian Income-tax levy?”

The High Court recorded answers to the questions as follows :

“ *Question 1.*—The assessee’s agency of the Imperial Chemical Industries (Export) Ltd., was not a separate business by itself and the closure of this business did not result in the destruction of a capital asset of the assessee.

Question 2.—The amounts of compensation received by the assessee from the Imperial Chemical Industries (Export) Ltd., were income chargeable in the hands of the assessee.

Question 3.—No part of the compensation money was received by the assessee on condition not to carry on a competitive business in explosives and consequently no part thereof was exempt from Indian Income-tax levy.”

With certificate of fitness granted by the High Court, these appeals have been preferred by the appellant.

The principal question in dispute is whether the amounts received by the appellant as compensation for loss of agency are of the nature of capital or revenue. It is necessary in the first instance to eliminate two subsidiary contentions raised by the appellant. It was urged that the amounts received by the appellant were in lieu of compensation for cancellation of the agency by the principal company, for loss of goodwill of the appellant’s business, and also in consideration of the appellant’s agreeing not to carry on any competitive business in explosives or other commodities in which business was carried on by the appellant under the agency agreement. It cannot seriously be disputed that compensation paid for agreeing to refrain from carrying on competitive business in the commodities in respect of which the agency was terminated, or for loss of goodwill would, *prima facie*, be of the nature of a capital receipt. But there is no evidence that compensation was paid to the appellant as consideration for giving the undertaking not to carry on a competitive business, or as compensation for loss of goodwill.

In the letter dated 11th March, 1947, it was expressly recited that as a condition of payment of compensation on the basis outlined therein the principal company had called upon the appellant to give a formal undertaking to refrain from selling

or accepting any agency for explosives or other commodities competitive with those covered by the agency agreement, but no such formal undertaking was ever given. It was recited in the last paragraph of the letter that the principal company will submit a formal agreement to the appellant for execution. But it appears that at the time of payment of the compensation and thereafter also both sides ignored this condition. Payment of compensation was spread over a period of three years, but that will not give rise to an inference that the object behind the payment was to enforce the undertaking, for the undertaking, if any, would have operated permanently whereas full compensation was payable within three years. If importance was attached to the undertaking the principal company would have declined to make even the first payment without insisting upon a formal agreement incorporating the undertaking. Whether the appellant did not in fact carry on any competitive business was never investigated and the absence of evidence on that point may reasonably justify the inference that the appellant never attempted to establish that part of its case. Granting that an agreement to refrain from carrying on a competitive business may be implied from subsequent conduct, in the absence of any material at any stage of the proceedings before the Revenue Authorities, it would be reasonable to hold that the appellant did not place any reliance upon the case that part of the compensation was attributable to an undertaking not to engage in competitive business.

No part of the compensation may be attributed to loss of goodwill suffered by the appellant. It is true that the agency had continued in the hands of the predecessors of the appellant and thereafter with the appellant for upwards of sixty years. It was urged that an extensive market had been built up in India and the goodwill of that business was on termination of the appellant's agency taken over by the new agents of the principal company and compensation paid in that behalf must be regarded as capital. But this question also was never raised before the Revenue Authorities, nor even before the Tribunal. The Tribunal observed that it had not been supplied with any material regarding the basis of the value of the goodwill, "nor anything to indicate as to what the written down value of the goodwill was, due to the termination of the agency." It therefore held that the inference sought to be drawn by the appellant that compensation was referable to the loss of goodwill was based on no evidence and the High Court agreed with that conclusion. We are unable to hold that the High Court was in so holding, in error. If it was the case of the appellant that a part of the compensation was in fact paid for loss of goodwill of the business, the appellant could have led evidence to establish that it was the intention of the parties that the loss of goodwill was to be compensated by payment of an amount which was included in the compensation ultimately paid by the principal company to the appellant. The business of agency had undoubtedly continued for more than sixty years, but there is no evidence about the terms of the agency agreement. There was no written agreement, and it is common ground that the agency was terminable at will. The principal company had, as early as 1945, informed the appellant that the distribution arrangement "would be terminated after two or three years." The appellant had sufficient notice of the proposed determination. Thereafter the agency was cancelled with effect from 1st April, 1948, and in the correspondence which is tendered in evidence, there is not even an indirect reference to any negotiation for payment of compensation for loss of goodwill, or any agreement in that behalf.

We may now address ourselves to the question, whether compensation paid by the principal company for cancellation of the agency may be regarded as a capital or revenue receipt. We have in a recent case in *Kettlewell Bullen & Co. v. The Commissioner of Income-tax, Calcutta*¹, made a survey of the important cases which have arisen before the Courts in the United Kingdom and in India about the principles which govern the determination of the nature of compensation received on the termination of an agency. We observed in that case:

1. Since reported (1964) 2 I.T.J. 208: (1964) 2 S.C.J. 384.

"On an analysis of these cases which fall on the sides of the dividing line, a satisfactory measure of consistency in principle is dissolved. Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business; nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue; where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt."

Examining the circumstances of the present case in the light of that principle, we agree with the High Court that what was received by the appellant was income and not capital. Compensation received by the appellant was for cancellation of the agency which was terminable at will. The appellant was to be paid an amount which was to be computed on the basis of the profits of the business. Under the letter dated 11th March, 1947, the appellant was to be paid "for the first three post-transfer years" two-fifths of the commission accrued on actual shares in the territory of the appellant's agency taken over by the Imperial Chemical Industries (India) Ltd., such commission to be computed at the rates of commission formerly paid to the appellant, and that in "the third post-transfer year" the principal company was to pay the appellant in addition a sum equivalent to full commission on the sales for that year effected by the Imperial Chemical Industries (India) Ltd., in the appellant's territory calculated at the same rates.

The appellant was conducting business as selling or distributory agent of numerous principals. The agency which was terminated was one of many such agencies in which the appellant functioned as distributing agent of a foreign principal. There is not even a suggestion, that by the determination of the agency held by the appellant in explosives from the principal company, the trading structure of the assessee's business was impaired. It is manifest that the agencies of the companies conducted by the appellant must have been obtained at different times. There is no evidence that these agencies were of any fixed duration. It would be reasonable to infer that some of the agencies may be cancelled and fresh agencies obtained. The list furnished by the appellant before the Tribunal analysing the different classes of business carried on by it disclosed that the business was done in many lines. The appellant acted as managing agent of some concerns, distributing agent of others, and as secretary of still other class of concerns. Again it dealt as an exporter and importer, shipping agent, and as a buyer and dealer in diverse commodities. A large amount of business was done by the appellant as an agent of foreign companies. The appellant had obtained agencies for paints, varnishes, petroleum, kerosene oil, medicines and toilet preparations, cement, timber, stationery, metals, tea, engineering goods, air-conditioning equipment and a large number of other commodities. It may reasonably be held, having regard to the vast array of business done by the appellant as agents, that the acquisition of agencies was in the normal course of business and determination of individual agencies, a normal incident, not affecting or impairing the trading structure of the appellant. The appellant was compensated by payment to it of the loss of profit it suffered by the cancellation of its agency, leaving it free to conduct its remaining business.

It was said that the appellant had employed expert officers who were accustomed to handle explosives which are a specialised commodity and the cancellation of that agency seriously affected the organization of its trading operations. But the appellant was undoubtedly dealing in several kinds of inflammable substances, such as, petroleum, kerosene oil, timber and similar other commodities. It is true that explosives would require great care in handling. It appears, however, that eighty per cent of the staff attached to the Magazine Section was maintained not at the expense of the appellant, but at the expense of the principal company. Out of the officers who were attached to the explosives business, services of five officers were taken over by the principal company and six others were retained by the appellant and absorbed in other branches. It cannot, therefore, be said that termination of the agency resulted in impairment of the trading organization of the appellant. One of the agencies was undoubtedly lost to the appellant, and even temporary dislocation in the organisation of the business thereby may be assumed. There is no evi-

dence, however, that the appellant could not in the ordinary course of business repair the dislocation. There is no evidence that it could not obtain an agency from another manufacturer of explosives. Even assuming that such an agency in explosives may not be replaced, that circumstance by itself may not justify the inference that the agency was independent of the other lines of business conducted by the appellant, or that by the cancellation of the agency an enduring asset was lost to the appellant. The circumstance that the agency was determinable at the will of the principal company which maintained a large staff at their expense justifies the inference that upon cancellation of that agency the appellant's business organization was not substantially impaired. The cancellation, it may be held, was an incident of the trading operations of the appellant in the normal course of business. The payment received by the appellant could not, therefore, be regarded truly as compensation for not carrying on the business : it was a sum which was worked out in terms of profits which the appellant would have earned during the period of notice and paid in the ordinary course of business to adjust the relations between the appellant and the principal company.

There is, in our judgment, no immutable principle that compensation received on cancellation of an agency must always be regarded as capital. In each case the question has to be determined in the light of the attendant circumstances. In the judgment in *Kettlewell Bullen & Co's case*¹, we have explained that the judgment of the Judicial Committee in the *Commissioner of Income-tax v. Shaw Wallace & Co.*², was not intended to, and did not lay down that in every case, cancellation of an agency resulted in loss of a source of revenue or that amounts paid to compensate for loss of agency must be regarded as capital loss.

On a careful consideration of all the circumstances we agree with the High Court that cancellation of the contract of agency did not affect the profit-making structure of the appellant, nor did it involve a loss of an enduring trading asset ; it merely deprived the appellant of a trading avenue, leaving him free to devote his energies after the cancellation to carry on the rest of the business, and to replace the contract lost by a similar contract. The compensation paid, therefore, did not represent the price paid for loss of a capital asset.

We therefore dismiss the appeals with costs.

V.S. : *Appeal dismissed.*

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

The State of Madras represented by the Agricultural I. T. Officer, Gudalur

* *Appellant*

G. J. Coelho

.. *Respondent.*

Madras Plantation Agricultural Income-tax Act, (V of 1955), section 5 (e).—Interest—Borrowed capital for acquisition of plantation estate—Expenditure wholly for the purpose of plantation—Not a capital expenditure or personal expense—Allowable deduction.

The assessee purchased a plantation estate in 1950 from out of borrowed capital and for the assessment year 1955-56, claimed to deduct the interest on the borrowed sum under section 5 of the Madras Act V of 1955. A limited allowance was made by the Officer under section 5 (k) of the Act and the claim to a substantial portion was rejected. The appeal to the Assistant Commissioner and further appeal to the Tribunal were successful. The High Court on revision under section 54 (1) of the Act allowed the deduction of the entire interest under section 5 (e) of the Act as an expenditure laid out or expended wholly and exclusively for the purposes of the plantation. The State appealed.

Held, the whole of the interest on the borrowed capital was deductible under section 5 (f) of the Act.

1. Since reported (1964) 2 I.T.J. 208 : (1964) 2

2. L.R. 59 I.A. 206 : 63 M.L.J. 124.

S.C.J. 384.

* C.A. No. 701 of 1963.

Applying the well known principles for determining whether an expenditure is of a capital nature or revenue, the payment of interest on borrowed capital is a revenue expenditure. No new asset is acquired with it; no enduring benefit is obtained. Expenditure incurred was part of circulating or floating capital of the assessee.

Any expense to discharge a personal obligation does not become a personal expense within section 5 (e). Personal expenses would include expenses on the person of the assessee or to satisfy his personal needs such as clothes, food, etc., or purposes not related to the business for which the deduction is claimed.

The assessee had bought the plantation for working it as a plantation, for growing tea, coffee and rubber. The payment of interest on the amount borrowed for the purchase of the plantation when the whole transaction of purchase and working of the plantation is viewed as an integrated whole, is so closely related to the plantation that the expenditure can be said to be laid out or expended wholly and exclusively for the purpose of the plantation, and allowable as such under section 5 (e).

No distinction can be made between interest paid on capital borrowed for the purpose of existing plantations and interest paid on capital borrowed for the acquisition of a plantation. Both are for the purposes of the plantation.

Appeal by Special Leave from the Judgment and Order dated 19th January, 1960 of the Madras High Court in T.R.C. No. 53 of 1957.

A. Ranganadham Chetty, Senior Advocate, (*A.V. Ranganam*, Advocate, with him), for Appellant.

C. P. Lal, Advocate, for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—The respondent, hereinafter referred to as the assessee, purchased an estate in 1950, known as Silver Cloud Estate, consisting of tea, coffee and rubber plantations, in Gudalur, Nilgiris, Madras State. Out of the sale price of Rs. 3,10,000 he borrowed Rs. 2,90,000, at interest varying from seven to eight per cent. per annum. For the assessment year 1955-56, the assessee claimed to deduct interest on this sum, amounting to Rs. 22,628-9-8. The Agricultural Income-Tax Officer, Gudalur, disallowed Rs. 21,057-15-1, allowing Rs. 1,570-10-7 under section 5 (k) of the Madras Plantations Agricultural Income-tax Act (Madras Act V of 1955), (hereinafter referred to as the Act). The relevant part of the assessment order is reproduced below :

“Interest on borrowing Rs. 21,057-15-1. The assessee has claimed Rs. 22,628-9-8 towards interest. It is seen that about Rs. 80,000 has been borrowed from various parties, for the maintenance of the estate. Under section 5 (k) the interest has to be limited to six per cent. on an amount equivalent to Rs. 25 per cent. of the agricultural income in that year. The gross income is Rs. 1,04,710-13-11. So the borrowing has to be limited to 25 per cent. of Rs. 1,04,710-13-11 which is Rs. 26,177-11-6. Interest at six per cent. on this amount is Rs. 1,570-10-7. So a sum of Rs. 21,057-15-1 is disallowed (22,628-9-8 minus 1,570-10-7).”

The assessee appealed to the Assistant Commissioner of Agricultural Income-tax, without success. He then appealed to the Madras Plantations Agricultural Income-tax, Appellate Tribunal, hereinafter referred to as the Tribunal. The Tribunal observed as follows :

“It is not possible to agree with the contention that interest paid in the year of account towards a loan borrowed by the proprietor for the purpose of acquisition of the estate will fall within the category of expenditure wholly and exclusively laid out for the purpose of the plantation. The immediate object of the expenditure, i.e., payment of interest is to liquidate a personal liability of the proprietor, as a debtor. That after such borrowing the debtor used it as sale price and acquired the estate, cannot make the payment of interest an “expenditure wholly and exclusively laid out for the purpose of the plantation.” The language of the various sub-divisions of section 5 of the Act referring to the various items of permissible deductions towards expenditure shows that the expenditure and the plantation must have a direct and proximate connection. Here, the proximate connection of the payment is with a personal loan and not with the plantation.”

The assessee filed a revision application to the High Court under section 54 (1) of the Act, and raised the following question before it :

“Question of law raised for decision by the High Court—Whether interest paid on monies borrowed for the purchase of the plantation is expenditure of the nature referred to in section 5 (e) of the Act and should therefore be deducted in assessing the income of the plantation during the year.”

The High Court held that the deduction claimed by the assessee fell within the scope of section 5 (e) of the Act, and that the whole of Rs. 22,628-9-8, and not

merely Rs. 1,570-10-7 should have been deducted from his assessable income. It ordered that the assessment be revised accordingly. The High Court refused to certify the case as a fit one, under Article 133 (1) (c) of the Constitution. But this Court gave Special Leave to the appellant to appeal against the judgment and order of the High Court.

The relevant statutory provisions are as under. Section 2 (a) defines 'agricultural income' and section 2 (r) defines 'plantation' :—

"2 (a) 'agricultural income' means—

- (1) any rent or revenue derived from a plantation;
- (2) any income derived from such plantation in the State by—
 - (i) agriculture, or
 - (ii) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or
 - (iii) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in sub-clause (ii);

Explanation I.—Agricultural income derived from such plantation by the cultivation of tea means that portion of the income derived from the cultivation, manufacture and sale of tea as is defined to be agricultural income for the purposes of the enactments relating to Indian Income-tax;

Explanation II.—Agricultural income derived from such plantation by the cultivation of coffee, rubber, cinchona or cardamom means that portion of the income derived from the cultivation, manufacture and sale of coffee, rubber, cinchona or cardamom, as the case may be, as may be defined to be agricultural income for the purposes of the enactments relating to Indian Income-tax;

2 (r) 'plantation' means any land used for growing all or any of the following, namely, tea, coffee, rubber, cinchona or cardamom ;"

Section 3 is the charging section and it directs that

"agricultural income-tax at the rate or rates specified in Part I of the Schedule to this Act shall be charged for each financial year commencing from 1st April, 1955, in accordance with and subject to the provisions of this Act, on the total agricultural income of the previous year of every person."

Section 4 describes what 'total agricultural income' Section 5 is concerned with the computation of agricultural income and directs the deduction of various items. We are concerned with two sub-clauses and they are set out below :

"5 (e) any expenditure incurred in the previous year (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of plantation ;

(k) any interest paid in the previous year on any amount borrowed and actually spent on the plantation from which the agricultural income is derived.

Provided that the need for borrowing was genuine having due regard to the assets of the assessee at the time ;

Provided further that the interest allowed under this clause shall be limited to six per cent. on an amount equivalent to twenty-five per cent. of the agricultural income from the plantation in that year."

The learned Counsel for the State contends that the interest paid by the assessee is not deductible under section 5 (e) of the Act on three grounds : first, it is in the nature of capital expenditure ; secondly, it is a personal expense of the assessee ; and thirdly, it is not laid out or expended wholly and exclusively for the purpose of the plantation.

Before adverting to the above grounds, it will be noticed that section 5 (e) is word for word a reproduction of section 10 (2) (xv) of the Income-tax Act, 1922, and as this Court and the High Courts have on various occasions considered the said clause, these decisions would be relevant for deciding the present case, which arises under the Act.

Is the payment of the said interest in the nature of capital expenditure or not ? Mr. Chetty urges that the assessee had bought the plantation with borrowed money.

and that was undoubtedly capital expenditure. He says that it follows logically from this that interest paid on the amount spent on the purchase of the plantation must also be capital expenditure. He invited our attention to a number of cases, with which we will shortly deal.

In order to determine whether an expenditure is revenue or capital expenditure, certain broad principles have to be borne in mind. This Court formulated these principles in *Assam Bengal Cement Co., Ltd. v. The Commissioner of Income-tax*¹, in the following words :

"(1) Outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment : vide *Lord Sands in Commissioners of Indian Revenue v. Grenite City Steamship Company*², and *City of London Contract Corporation v. Styles*³.

(2) Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade: vide *Viscount Cave, L.C., in Atherton v. British Insulated and Helsby Cables, Ltd.*⁴ If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether. Thus, if labour saving machinery was acquired, the cost of such acquisition cannot be deducted out of profits by claiming that it relieves the annual labour bill; the business has acquired a new asset, that is, machinery.

The expressions 'enduring benefit' or 'of a permanent character' were introduced to make it clear that the asset or the right acquired must have enough durability to justify its being treated as a capital asset.

(3) Whether for the purpose of the expenditure, any capital was withdrawn, or in other words, whether the object of incurring the expenditure was to employ what was taken in as capital of the business. Again, it is to be seen whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital. Fixed capital is what the owner turns to profit by keeping it in his own possession. Circulating or floating capital is what he makes profit of by parting with it or letting it change masters. Circulating capital is capital which is turned over and in the process of being turned over yields profit or loss. Fixed capital, on the other hand, is not involved directly in that process and remains unaffected by it."

This Court further held that

"one has got to apply these criteria, one after the other from the business point of view and come to the conclusion whether on a fair appreciation of a whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which later event only it would be a deductible allowance under section 10 (2) of the Indian Income-tax Act, 1922"

If we apply these principles to the facts of this case, the answer seems clear that the payment of interest is revenue expenditure. No new asset is acquired with it; no enduring benefit is obtained. Expenditure incurred was part of circulating or floating capital of the assessee. In ordinary commercial practice payment of interest would not be termed as capital expenditure.

The cases relied on by Mr. Chetty do not bear on the precise problem. We may, however, notice them in brief. In *S. Kuppuswami v. The Commissioner of Income-tax, Madras*⁵, the assessee was held to have acquired the goodwill by paying a certain share of profits. This was held to be capital expenditure. In *Commissioner of Income-tax, Madras v. Siddareddy Venkasubba Reddy*⁶, the assessee had under certain agreements obtained mining rights in different plots of land for periods varying from five to nine years, and claimed deduction of the amounts paid by them under the said agreements. The High Court held the money expended for the acquisition of mining rights to be capital expenditure.

In *The European Investment Trust Company, Limited v. Jackson*⁷, the Court of Appeal was concerned with the interpretation of rule 3 of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918 (8 and 9, Geo. V, c. 40).

1. (1955) S.C.J. 205 : (1955) 1 M.L.J. (S.C.)
118 : (1955) 1 S.C.R. 972.
2. (1927) 13 T.C. 1.
3. (1887) 2 T.C. 239.
4. (1926) 10 T.C. 155.

5. (1955) 1 M.L.J. 22 : I.L.R. (1954) Mad. 977.
6. (1948) 2 M.L.J. 581 : (1949) 17 I.T.R. 15 :
I.L.R. (1949) Mad. 783 : A.I.R. 1949 Mad. 568.
7. (1922) 18 T.C. 1.

In the English Act there are a series of prohibitions ; among other things prohibited to be deducted are any capital withdrawn from or any sum employed or intended to be employed as capital in such trade, profession or employment or vocation, and any annual interest or any annuity or annual payment payable out of profits. The English cases like *The European Investment Trust Company Case*¹, are distinguishable because in England there existed the prohibitions enumerated above. There are no such prohibitions in the Act with which we are concerned. But apart from these prohibitions, Lord Herschell observed in *Gresham Life Assurance Society v. Styles*², as follows :

"I think the fourth rule was primarily designed to meet such a case as that in which a trader had contracted to make an annual payment out of his profits, as for example, when he had agreed to make such a payment to a former partner or to a person who had made a loan on the terms of receiving such a payment. But for the rule it might plausibly have been contended that in such a case a trader was only to return as his profits what remained after such payment" (*italics supplied*).

Accordingly, we hold that there is no force in the contention that the payment of interest was capital expenditure within section 5 (e) of the Act.

The next point, namely, that the payment of interest was a personal expense is equally without substance. We are unable to appreciate that any expense to discharge a personal obligation becomes a personal expense within section 5 (e). Personal expenses would include expenses on the person of the assessee or to satisfy his personal needs such as clothes, food, etc., or purposes not related to the business for which the deduction is claimed.

The third ground raised by Mr. Chetty needs careful scrutiny. This Court, after reviewing English and Indian cases, summarised the position in *Commissioner of Income-tax, Kerala v. Malayalam Plantation, Ltd.*³, as follows :

"The aforesaid discussion leads to the following result : The expression 'for the purpose of the business' is wider in scope than the expression 'for the purpose of earning profits'. Its range is wide: it may take in not only the day-to-day running of a business but also the rationalization of its administration and modernization of its machinery ; it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title ; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business ; it may comprehend many other acts incidental to the carrying on of a business. However wide the meaning of the expression may be, its limits are implicit in it. The purpose shall be for the purpose of the business, that is to say, the expenditure incurred shall be for carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business. It cannot include sums spent by the assessee as agent of a third party, whether the origin of the agency is voluntary or statutory ; in that event, he pays the amount on behalf of another and for a purpose unconnected with the business."

Before deciding the question, it is necessary to mention three other decisions of this Court. In *Eastern Investment, Ltd. v. Commissioner of Income-tax, West Bengal*⁴, this Court held that interest on debentures issued by an investment company was to be allowed as business expenditure under section 12 (2) of the Indian Income-tax Act. It observed that

"this being an investment company if it borrowed and utilised the same for its investments on which it earned income, the interest paid by it on the loans will clearly be a permissible deduction under section 12 (2) of the Act".

Earlier, it had observed that *Scottish North American Trust v. Farmer*⁵ was a somewhat similar case.

In *Dharamvir Dhir v. The Commissioner of Income-tax*⁶, this Court held that a payment of 11/16th of the net profits of the assessee's business was an expenditure wholly and exclusively laid out for the purposes of the business as the assessee had arranged financing of the business on the best terms that he could manage.

In the *Commissioner of Income-tax, Bombay v. Jagannath Kissonlal*⁷, this Court upheld the claim of the assessee to deduct the amount it had to pay the bank on a joint promissory note.

1. (1922) 18 T.C. 1.

2. (1892) 3 T.C. 185 : L.R. (1892) A.C. 309.

3. Since reported in (1964) 2 I.T.J. 130 (1964) 2 S.C.J. 338 (S.C.).

4. (1951) S.C.J. 420 : (1951) A.L.J. 613 : (1951) S.C.R. 594.

5. (1910) 5 T.C. 693.

6. (1961) 3 S.C.R. 359 : A.I.R. 1961 S.C. 668 : (1962) 2 S.C.J. 412.

7. (1961) 1 M.L.J. (S.C.) 187 : (1961) 2 S.C.R. 644 : (1961) 1 S.C.J. 691 : (1961) 1 An.W.R. (S.C.) 187.

The only case cited by Mr. Chetty, which has some resemblance to the present case is the decision of the Bombay High Court in *Metro Theatre Bombay, Ltd. v. The Commissioner of Income-tax*¹. But this case is distinguishable for the interest claimed to be deducted, and which was disallowed, was in respect of the amount borrowed for acquiring land on 999 years lease, on which a cinema was subsequently built. There was no immediate connection between the interest paid and the cinema business. As Kania, J., as he then was, put it,

"if the interest was not paid, the result would be not necessarily the stoppage of showing films, but the assessee will not acquire the lease of this property."

Applying the above principles to the facts of this case, it seems to us that it is impossible to dissociate the character of the assessee as the owner of the plantation and as a person working the plantation. The assessee had bought the plantation for working it as a plantation, i.e., for growing tea, coffee and rubber. The payment of interest on the amount borrowed for the purchase of the plantation when the whole transaction of purchase and the working of the plantation is viewed as an integrated whole, is so closely related to the plantation that the expenditure can be said to be laid out or expended wholly and exclusively for the purpose of the plantation. In this connection, it is pertinent to note that what the Act purports to tax is agricultural income and not agricultural receipts. From the agricultural receipts must be deducted all expenses which in ordinary commercial accounting must be debited against the receipts. There is nothing in the Act which prohibits such expenses from being deducted. No farmer would treat interest paid on capital borrowed for the purchase of the plantation as anything but expenses, and as long as the deductions be claims, apart from any statutory prohibition, can be fairly said to lead to the determination of the true net agricultural income, these must be allowed under the Act. In principle, we do not see any distinction between interest paid on capital borrowed for the acquisition of a plantation and that paid on capital borrowed for the purpose of existing plantations. Both are for the purposes of the plantation.

In the result, we agree with the High Court that the deduction claimed by the assessee fell within the scope of section 5 (e) of the Act, and that the whole of Rs. 22,628-9-8 and not merely Rs. 1,570-10-7 should have been deducted from his assessable income. The appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J.C. SHAH AND S. M. SIKRI, JJ.

Commissioner of Income-tax, Madras

Appellant*

Express Newspapers, Limited, Madras

Respondent.

Income-tax Act (XI of 1922), sections 6, 10 (2) (vii), second proviso, 12-B and 26 (2)—Balancing charge—Sale of machinery, etc., following closure of business—Excess over written down value—Whether taxable—User of machinery, etc., in business during year of sale—Whether essential—Succession to business—Predecessor not found—Assessment of successor in respect of predecessor's income—Ambit of liability—Whether limited to business profits—Whether excludes capital gains.

On 31st August, 1946, F company carrying on business as printers and publishers of newspapers passed a resolution transferring, with all the rights and liabilities, to the assessee, a new company formed in April, 1946, the right to print and publish the said newspapers from 1st September, 1946, letting out its machinery and assets. The assessee started publishing newspapers from 1st September, 1946. On 31st October, 1946, F company resolved at a general body meeting to wind up the company voluntarily. The liquidator appointed thereunder was directed not to carry on the business of the company. On 1st November, 1946, the liquidator confirmed the transfer of assets made by F company and machinery was sold yielding a profit of Rs. 6,08,666 to F company. This amount was made up of (i) the difference between the original cost price and the written down value of the machinery and (ii) capital gains, the amount in excess over the original

cost price. The Department brought the two items to tax. The Tribunal held the capital gains alone to be taxable. The High Court on Reference answered the points in favour of the assessee. The Department appealed to the Supreme Court.

Held, that the conditions necessary for applying the second proviso to section 10 (2) (vii) are : (i) during the entire previous year or part of it the business shall have been carried on by the assessee ; (ii) the machinery shall have been used in the business ; (iii) the machinery shall have been sold when the business was being carried on and not for the purpose of closing it down or winding it up.

If the sale of the machinery took place after the business was closed and during the winding up proceedings, it would fall outside the scope of the second proviso to section 10 (2) (vii) and the profits are not assessable to tax.

Further held, the profits and gains of business and capital gains are two distinct concepts in the Income-tax Act : the former arises from the activity which is called business and the latter accrues because capital assets are disposed of at a value higher than what they cost the assessee. These are placed under different heads under section 6. These are derived from different sources and the income is computed under different methods.

Section 12-B only introduces a limited fiction, namely, that capital gains accrued will be deemed to be income of the previous year in which the sale was effected. The fiction does not make them the profit or gains of the business. It is well settled that a legal fiction is limited to the purpose for which it is created and should not be extended beyond its legitimate field.

Section 26 (2) is limited to the income from business. Capital gains in the hands of the assessee-successor cannot be brought to tax under the section.

Appeal from the Judgment dated 1st March, 1960 of the Madras High Court in Case Referred No. 11 of 1955.

K. N. Rajagopal Sastri, Senior Advocate, (*R. N. Sachithy*, Advocate, with him), for Appellant.

R. Ganapathy Iyer and *R. Gopalakrishnan*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal by Special Leave is preferred against the order of the Madras High Court in a Reference made to it by the Income-tax Appellate Tribunal under section 66 (1) of the Income-tax Act, 1922, hereinafter called the Act.

The facts leading up to the Reference and relevant to the present enquiry are as follows. The Free Press of India (Madras), Ltd., hereinafter called the Free Press Company, was a private limited company carrying on business as printers and publishers of certain newspapers, namely "Indian Express", "Dhinamani", and "Andhra Prabha" at Madras, "Eastern Express" and "Bharat" at Calcutta and "Sunday Standard" and "Morning Standard" at Bombay. On August 31, 1946, the Free Press Company passed a resolution transferring to the Express Newspapers, Limited, a new company formed on or about April 22, 1946, hereinafter called the assessee-company, the right to print and publish the said newspapers from September 1, 1946, letting out its machinery and assets and authorizing the assessee-company to collect the book debts and pay off the liabilities of the Free Press Company. The assessee-company accordingly started publishing newspapers from September 1, 1946. On October 31, 1946, the Free Press Company resolved at a General Body Meeting to wind up the company voluntarily. The liquidator appointed thereunder was directed not to carry on the business of the company. On November 1, 1946, the liquidator ascertained the value of the assets over the liabilities taken over by the assessee-company as per the balance-sheet at Rs. 19,36,000, and this amount was credited to the account of the two directors of the Free Press Company in the assessee's books. The profit of the Free Press Company was worked out to be Rs. 6,08,666, being the difference between the written down value and the sale price of the machinery. That sum was made up of, (i) the difference between the original cost price and the written down price of the machinery, Rs. 2,14,090, and (ii) the amount in excess over the original cost price, Rs. 3,94,576. The Income-tax Officer included the said two items in the total income of the assessee-company under the following heads, (i) profit under proviso to section 10 (2) (vii), Rs. 2,14,090 and (ii) capital gains under section 12-B, Rs. 3,94,576 and assessed each to tax. The Income-tax Appellate Tribunal upheld the validity of the inclusion of the item under capital gains in the total income of the assessee but decided against the inclusion of the first item.

The Appellate Tribunal referred the following two questions, among others, for the decision of the High Court of Madras under section 66 (1) of the Income-tax Act :

"4. Whether Free Press Company made a business profit of Rs. 2,14,090 under proviso to section 10 (2) (vii) of the Act ?"

"6. Whether the capital gain made by the Free Press Company is liable to be assessed in the hands of the Express Company under section 26 (2) of the Act ?"

The Reference was heard by a Division Bench of the High Court, consisting of Rajagopalan and Ramchandra Iyer, JJ., who by their judgment answered the two questions in the negative and against the Department. The present appeal is preferred against the said judgment of the High Court.

The argument in the appeal proceeded on the basis of the following facts. During the accounting year 1946-47 the Free Press Company did not do the business of printing and publishing newspapers from September 1, 1946, and thereafter the assessee-company alone was carrying on the said business. The Free Press Company went into voluntary liquidation on October 31, 1946, and the liquidator, on November 1, 1946, confirmed the transfer of the assets made by the Free Press Company to the assessee-company. Therefore, on November 1, 1946, the aforesaid machinery was sold yielding a profit of Rs. 6,08,666 to the Free Press Company, being the difference between the written down value and the sale price of the machinery. Broadly stated, the machinery was sold by the Free Press Company during the accounting year after it closed down its business and after it went into voluntary liquidation. On those facts learned Counsel for the Revenue raised before us the following two contentions : (1) The first item of Rs. 2,14,090, representing the surplus over the written down value of the machinery was assessable in accordance with the proviso to section 10 (2) (vii) of the Act ; and (2) the second item of Rs. 3,94,576, representing the capital gains made by the Free Press Company is assessable in the hands of the assessee-company, who succeeded to the said business, under section 26 (2) of the Act.

Learned Counsel for the respondent contended that neither the conditions laid down in section 10 (2) (vii) of the Act nor those laid down in section 26 (2) thereof attracted the said two items of income and, therefore, they were not assessable in the hands of the assessee-company.

The first question turns upon the relevant provisions of section 10 of the Act. To have a clear view of the scope of the relevant provisions it will be convenient to read them at one place :

Section 10.—(1) The tax shall be payable by an assessee under the head "Profits and gains of business, profession or vocation" in respect of the profit or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :

(iv) in respect of insurance against risk of damage or destruction of buildings, machinery, plant, furniture, stocks or stores, used for the purposes of the business, profession or vocation, the amount of any premium paid ;

(v) in respect of current repairs to such buildings, machinery, plant or furniture, the amount paid on account thereof ;

(vii) in respect of any building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold or its scrap value :

Provided further that where the amount for which any such building, machinery or plant is sold, whether during the continuance of the business or after the cessation thereof, exceeds the written down value, so much of the excess as does not exceed the difference between the original cost and the written down value shall be deemed to be profits of the previous year in which the sale took place :

We are concerned with the second proviso to section 10 (2) (vii) of the Act. The substantive clause grants a balancing allowance in respect of building, machinery

or plant which has been sold or discarded or demolished or destroyed. The allowance represents the excess of the written down value over the sale price. Under the proviso, if the sale price exceeds the written down value, but does not exceed the original cost price, the difference between the original cost and the written down value shall be deemed to be profits of the year previous to that in which the sale takes place; that is to say, the difference between the price fetched at the sale and the written down value is deemed to be the escaped profits for which the assessee is made liable to tax. As the sale price is higher than the written down value, the difference represents the excess depreciation mistakenly granted to the assessee. To illustrate: assume that the original cost of a machinery or plant is Rs. 100 and depreciation allowed is Rs. 25; the written down value is Rs. 75. If the machinery is sold for Rs. 100, it is obvious that depreciation of Rs. 25 was wrongly allowed. If it had not been allowed that amount would have swelled the profits to that extent. When it is found that it was wrongly allowed that profit is brought to charge. The second proviso, therefore, in substance, brings to charge an escaped profit or gain of the business carried on by the assessee. The scope of this proviso cannot be ascertained in vacuum. The conditions for its applicability can be ascertained only in its relation to the other related provisions. Under section 3 of the Act income-tax shall be charged for any year in accordance with and subject to the provisions of the Act in respect of the total income of the previous year of every assessee; under section 6, one of the heads of taxable income is "profits and gains of business, profession or vocation"; under section 10 (1), the tax under that head is payable in respect of profit or gains of any business carried on by the assessee during the accounting year. The main condition which attracts all the other sub-sections and clauses of the section is that the tax shall be payable by an assessee in respect of the profit or gains of business etc., carried on by him. The crucial words are "business carried on by him". If the profits or gains were not earned when the business was being carried on by the assessee during the accounting year, they would fall outside the provision of section 10 (1). For instance, if the machinery sold after the business was closed or when the business was under liquidation, it would not be appropriate to hold that the profit or gains earned by the sale were in respect of the business that was being carried on by the assessee. The second condition that attracts the second proviso is implicit in the adjective "such" preceding "building, machinery or plant" sold. The adjective "such" refers back to clauses (iv), (v), (vi) and (vii) of section 10 (2). Under clause (iv) an allowance is allowed in regard to any premium paid in respect of insurance against risk of damage or destruction of buildings, machinery, plant, etc., used for the purpose of the business, profession or vocation. Under this clause allowance is allowed only in respect of the machinery used for the purpose of the business. Clauses (v), (vi) and (vii) refer to such buildings, machinery, plant, etc.; that is to say, such buildings, machinery, plant, etc. used for the purpose of the business. The result is that the second proviso will only apply to the sale of such machinery which was used for the purpose of the business during the accounting year. It brings in to charge the escaped profits under the guise of superfluous allowances if the machinery sold was used for the business during the accounting year when the business was being carried on. Therefore, to bring the sale proceeds to charge the following conditions shall be fulfilled: (1) During the entire previous year or a part of it the business shall have been carried on by the assessee; (2) the machinery shall have been used in the business; and (3) the machinery shall have been sold when the business was being carried on and not for the purpose of closing it down or winding it up. If these were the conditions for the applicability of the said proviso, the sale of the machinery in the instant case having taken place after the business was closed and during the winding up proceedings, it would fall outside the scope of the said proviso and therefore the first item is not assessable to tax.

This point directly arose for consideration in *The Liquidators of Pursa Limited v. Commissioner of Income-tax, Bihar*¹. There, the assessee-company carried on the

business of growing sugarcane and manufacturing and selling sugar. In the year 1943 it negotiated for the sale of the factory and other assets with the object of winding up the company. It received a firm offer on 9th August, 1943, and concluded the agreement of sale on 7th December, 1943. Between 9th August, 1943, and 7th December, 1943, it never used the machinery and plant for the purpose of manufacturing sugar or any other purpose except that of keeping them in trim and running order. In the assessment of the company to income-tax for the accounting period from 1st October, 1943 to 30th September, 1944, the Income-tax authorities treated the surplus made by the company on the sale of the buildings, plant and machinery as profits under proviso (2) to section 10 (2) (vii) of the Act. This Court held that the said amount was not taxable. This Court rejected the contention of the Revenue that the said excess was taxable on two grounds, namely,

(1) "the sale of the machinery and plant was not an operation in furtherance of the business carried on by the company but was a realisation of its assets in the process of gradual winding up of its business which eventually culminated in the voluntary liquidation of the company", (2) "even if the sale of the stock of sugar be regarded as carrying on of business by the company and not a realisation of its assets with a view to winding up, the machinery or plant not being used in the accounting year at all and in any event not having had connection with the carrying on of that limited business during the accounting year, section 10 (2) (vii) could have no application to the sale of any such machinery or plant".

Learned Counsel for the Revenue contends that the main reason for the decision was that the machinery or the plant was not used in the accounting year for the business and that the second reason, namely, that the assets were sold in the process of gradual winding up of the company was only an observation and that the decision was not based upon the said observation. But a careful perusal of the judgment discloses beyond any reasonable doubt that the decision was based upon both the grounds. As in the present case the machinery was sold not for the business but only for closing it during the liquidation proceedings, this decision directly covers the present case.

This question again fell to be considered by this Court in *The Commissioner of Income-tax, Bombay Circle II v. The National Syndicate, Bombay*¹. There, the National Syndicate, a Bombay firm, acquired on 11th January, 1945, a tailoring business as a going concern for Rs. 89,321 which included the consideration paid for sewing machines and a motor lorry. Soon after the purchase the respondent found it difficult to continue the business, and therefore it closed its business in August, 1945. Between 16th August, 1945, and 14 February, 1946, sewing machines and the motor lorry were sold at a loss. The respondent closed its account books on 28th February, 1946, showing the two losses and writing them off. For the assessment year 1946-47, the respondent claimed a deduction under section 10 (2) (vii) of the Indian Income-tax Act. The question fell to be considered on a construction of the provisions of section 10 (2) (vii) of the Act. This Court, speaking through Hidayatullah, J., held that the loss was a business loss, though the machines and the motor lorry were sold after the business was closed down, as the said machines and lorry were used for the purpose of the business during a part of the accounting year and were sold during the accounting year. This Court, after noticing the decision under appeal and that of this Court in *The Liquidators of Purna Limited v. Commissioner of Income-tax, Bihar*², and the amendment introduced in the second proviso to section 10 (2) (vii) of the Act, observed :

"But it is to be noticed that no such amendment was made in clause (vii) to exclude loss over buildings, machinery or plant after the closure of the business. It is thus clear that the principles which govern the proviso cannot be used to govern the main clause, because profit or loss arise in different ways in business. The two rulings do not, therefore, apply to the facts here."

It is contended that the principle accepted by this decision is in conflict with that laid down in the case of *The Liquidators of Purna Limited*². It is said that the condition that the sale of the machinery at a loss should have been before the closing of the business is impliedly laid down by section 10 (1) of the Act which applies

equally to clause (vii) as well as to the second proviso thereto, and that if the condition need not be fulfilled in the case falling under the substantive part of clause (vii) of section 10 (2) of the Act, it will be incongruous to apply it to a case falling under the second proviso before it was amended. So stated there in some plausibility in the argument. But this Court in express terms made a distinction between the scope of the substantive part of clause (vii) and that of the second proviso thereto and expressly distinguished those rulings on the ground that they would not apply to the construction of the substantive part of clause (vii). When this Court expressly confined the scope of the decision to the substantive part of clause (vii) without disturbing the validity of the decisions governing the second proviso, it is not proper that we should rely upon it in preference to a direct decision on the second proviso to clause (vii) of section 10 (2) of the Act before it was amended.

This Court in *K. M. S. Reddy, Commissioner of Income-tax, Kerala v. The West Coast Chemicals and Industries, Ltd. (in liquidation), Alleppy*¹, held that a winding up sale was not trading or doing business. There, chemicals and other raw materials were sold not in the course of ordinary trading but only in realisation sale after the company had been wound up. This Court speaking through Hidayatullah, J., posed the following question :

"The question, therefore, is whether there can be said to be a sale in the carrying on of the business in respect of the chemicals and other raw materials."

After referring to the passages in Halsbury's Laws of England, 3rd Edition, Volume 20, pages 115-117, wherein it was stated that "mere realisation of assets is not trading" and that there was distinction between sales forming part of the trading activities and those where the realisation was not an act of trading, the learned Judge observed that the said distinction was a sound one. The learned Judge, on a consideration of other decisions, also accepted as correct the distinction made between a sale of the entire stock as part of trading and the sale of a part of the stock as winding up sale. Then the learned Judge applied the principles to the facts of the case and held that it was impossible to infer that the chemicals and raw materials were sold in the ordinary way of business or that the assessee company was carrying on a trading business. This decision again accepts the distinction between a sale held in the ordinary way of business and that held for the purpose of winding up the business and that in the latter case the profits accrued are not trading profits. This case no doubt did not turn upon the provisions of the second proviso to clause (vii) of section 10 (2) of the Act, but the principle accepted therein is the basis for the application of section 10 of the Act and that will apply to all provisions of section 10, unless an exception is made in a particular provision. For the foregoing reasons, we hold that the first item is not liable to tax. The Court has given the correct answer to the first question submitted to it.

The second item relates to capital gains. That represents the excess of the price obtained on the sale of the machinery over its original cost price. It is conceded that it does not represent profits and gains of business, but it falls under the heading "capital gains". But it is argued that, as the Free Press Company was wound up and, therefore, could not be found, the assessee, who had succeeded to it, would be liable to be assessed for the said capital gains under the proviso to section 26 (2) of the Act. To appreciate the contention some of the relevant provisions of the Act may be read :

Section 6.—Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely :—

(iv) Profits and gains of business, profession or vocation.

(vi) Capital gains.

Section 10—(1) The tax shall be payable by an assessee under the head “profits and gains of business, profession or vocation” in respect of the profit or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :—

Section 12-B—(1) The tax shall be payable by an assessee under the head “Capital gains” in respect of any profits or gains arising from the sale, relinquishment or transfer of a capital asset effected after the death of the assessee. Profits and gains shall be deemed to be income of the previous year in which the sale, relinquishment or transfer took place.

Section 24—(2-A) Notwithstanding anything contained in sub-section (1), where the loss sustained is a loss falling under head “Capital gains” such loss shall not be set-off except against any profits and gains falling under the head.

(2-B) Where such as is referred to in sub-section (2-A) and the loss cannot be wholly set-off shall be carried forward to the next year and set-off against capital gains for that year, and if it cannot be so set-off, the amount thereof not so set-off shall be carried forward to the following year and so on, so however that no such loss shall be carried forward for more than eight years.

Provided that where the loss sustained by an assessee, not being a company, in any previous year does not exceed five thousand rupees, it shall not be carried forward.

Section 26—(2) Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year.

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid.

A conspectus of the said sections discloses a clear cut scheme. Though income-tax, is only one tax levied on the total income, section 6 enumerates six heads whereunder the income of an assessee falls to be charged. This Court in *United Commercial Bank Ltd. v. Commissioner of Income-tax, West Bengal*¹, laid down that sections 7 to 12 are mutually exclusive and where an item of income falls specifically under one head it is to be charged under that head and no other. The expression “income, profits and gains” in section 6 is a composite concept which takes in all the six heads of income mentioned therein. The 4th head is “profits and gains of business, profession or vocation” and the 6th head is “capital gains”. Section 10 taxes the profits and gains of a business, profession or vocation carried on by an assessee; it also enumerates the different kinds of allowances that can be made in computing the profits. Under section 10 (1), as we have already pointed out, the necessary condition for the application of the section is that the assessee should have carried on the business for some part of the accounting year. Section 26 (2) indicates the manner of assessment of the income, profits and gains of any business, profession or vocation. This section does not provide for the assessment of income under any other head. It only says that if there is a succession to a person carrying on business during an accounting year, the person succeeded and the person succeeding can each of them be assessed in respect of his actual share. The proviso deals with a case where the person succeeded cannot be found; in that event, the assessment of the profits of the year in which the succession took place up to the date of the succession and for the year preceding that year shall be made on the person succeeding him. If an assessment has already been made in respect of the said years on the person succeeded, it can be recovered from the person succeeding. But both sub-section (2) and the proviso deal only with income, profits and gains of the business, that is to say, for the assessment made in respect of profit and gains under the 4th head of section 6.

Now turning to section 12-B, it provides for capital gains. Under that section the tax shall be payable by the assessee under the head capital gains in respect of any profits or gains arising from the sale of a capital asset effected during the prescribed period. It says further that such profits or gains shall be deemed to be income of the previous year in which the sale etc., took place. This deeming clause does not lift the capital gains from the 6th head in section 6 and place it under the 4th head. It only introduces a limited fiction, namely, that capital gains accrued will be deemed to be income of the previous year in which the sale was effected. The fiction does not make them the profit or gains of the business. It is well settled that a legal fiction is limited to the purpose for which it is created and should not be extended beyond its legitimate field. Sub-sections (2-A) and (2-B) of section 24 provide for the setting-off of the loss falling under the head "capital gains" against any capital gains falling under the same head. Such loss cannot be set-off against an income falling under any different head. These three sections indicate beyond any doubt that the capital gains are separately computed in accordance with the said provisions and they are not treated as the profits from the business. The profits and gains of business and capital gains are two distinct concepts in the Income-tax Act; the former arises from the activity which is called business and the latter accrues because capital assets are disposed of at a value higher than what they cost the assessee. They are placed under different heads; they are derived from different sources; and the income is computed under different methods. The fact that the capital gains are connected with the capital assets of the business cannot make them the profit of the business. They are only deemed to be income of the previous year and not profit or gains arising from the business during that year.

If that be the scheme of the Act, the contention of the learned Counsel for the Revenue can easily be answered. He asks that if section 26 (2) deals with only profits and gains of the business, why should the Legislature use the word "income" therein? As we have indicated, the expression "income, profits and gains" is a compendious term to connote the income from the various sources mentioned in section 6; therefore, the use of such an expression does not efface the distinction between the different heads, but only describes the income from the business. The expression "profits" in the proviso makes it clear that the income, profits and gains in sub-section (2) of section 26 only refer to the profits under the 4th head in section 6. On the other hand, if the interpretation sought to be put upon the expression "income" in sub-section (2) of section 26 by the Revenue is accepted, then the absence of that word in the proviso destroys the argument. But the more reasonable view is that both the sub-section and the proviso deal only with the profits under the 4th head mentioned in section 6 and, so construed, it excludes capital gains. The argument that sub-section (2) of section 26 read with the proviso thereto indicates that the total income of the person succeeded is the criterion for separate assessment under sub-section (2) and for assessment and realisation under the proviso is on the assumption that sub-section (2) and the proviso deal with all the heads mentioned in section 6 of the Act. But if, as we have held, the scope of sub-section (2) of section 26 is only limited to the income from the business, the 'share' under sub-section (2) and the assessment and realisation under the proviso can only relate to the income from the business. The argument is really begging the question itself. In the result we agree with the High Court in regard to the answer it has given in respect of the second question.

In this view no other question arises for our consideration.

In the result, the appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Original Jurisdiction.)

PRESENT :—A. K. SARKAR, M. HIDAYATULLAH AND J. C. SHAH, JJ.

Hazara Singh Gill

.. Petitioner*

v.

The State of Punjab

.. Respondent.

Criminal Procedure Code (V of 1898), section 527—Petition for transfer—Procedure—Grounds for transfer.

In proceedings for transfer under section 527, Criminal Procedure Code, of pending cases the Court does not examine witnesses in support of allegations of fact made by either side. Ordinarily, the Court acts upon the affidavit of one side or that of the other. But if one side omits to make an affidavit in reply the affidavit of the other side remains uncontroverted. Where the petitioner has by his affidavit, made out sufficient circumstances from which it can be inferred that he does entertain, and entertain reasonably, an apprehension that he would not get justice in the cases pending against him, the Court would not hesitate to transfer the cases outside the State.

Petition under section 527, Criminal Procedure Code, for Transfer of Cases Nos. 33/3 and 33/4 of 1963, under section 52 of the Prisons Act, pending in the Court of Magistrate, 1st Class, Amritsar, to a competent Court outside the State of Punjab.

G. S. Vohra and Harbans Singh, Advocates, for Petitioner.

L. D. Kaushal, Deputy Advocate-General, for the State of Punjab (*P. D. Menon*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Hidayatullah, J.—This is a petition by one Hazara Singh Gill for the transfer of two criminal cases (Nos. 33/3 and 33/4 of 1963) under section 52 of the Prisons Act, pending for trial in the Court of Mr. Sant Singh, Magistrate, First Class, Amritsar. The petitioner requests that these cases be transferred outside the State of Punjab for disposal. The facts, in so far as they have been admitted by the State of Punjab, are as follows.

The petitioner is a resident of village Rattoke in the Amritsar District. He was elected as member of the Punjab Vidhan Sabha in the last General Elections after defeating S. Hardip Singh, the brother-in-law of the Chief Minister of the State. S. Surrinder Singh Kairon, son of the Chief Minister, and S. Ranjit Singh Grewal, who was posted as Senior Superintendent of Police at Amritsar, have married sisters. S. Mukund Singh, the father-in-law of S. Surrinder Singh, owned vast lands. S. Mukund Singh died without leaving any male issue and the estate came under the Court of Wards, and the petitioner obtained some of the lands from the Court of Wards. In May, 1960, the agitation for what is described as the 'Punjabi Suba' was started and the petitioner was arrested under sections 411, 414, Indian Penal Code, and a report was sent against him under section 107/151, Criminal Procedure Code, and a warrant was also issued. The petitioner was held for interrogation on a remand by the Court. The petitioner was also arrested in a case under the Arms Act, and another, under the Indian Opium Act. His father and six others were arrested on 26th January, 1961, under section 107/151, Criminal Procedure Code, but were discharged as a result of compromise in Court. The petitioner was convicted and sentenced to two years' rigorous imprisonment in the case under the Arms Act and that sentence has been upheld by the High Court. He was also convicted in a case under the Prisons Act and sentenced to six months' rigorous imprisonment, which sentence was also confirmed by the High Court. These sentences are to run consecutively. The two cases in which the transfer is asked for are now pending and they have been referred to the Magistrate by the Superintendent, Jail, Amritsar. The petitioner points out that another petition of S. Mohan Singh Tur was transferred from the Punjab to Saharanpur by this Court.

What is not admitted or evasively denied in the affidavit of the State Government are the following facts stated by the petitioner on affidavit : After his election to the Vidhan Sabha, he has not been able to attend any meeting because he has been arrested and continuously kept in jail; that the petitioner is a protagonist of the Punjabi Suba, and supported the Akali candidates as against the Sadh Sangat Board which is supported by the Chief Minister ; and that in the criminal cases in which the petitioner was arrested, a bail of Rupees one lakh was demanded from him as also from his father and six others. Since such a heavy bail could not be furnished, his father and the other persons languished in jail for four months till they were discharged on compromise in Court, while he continued in jail. Further, a suit has been filed against the petitioner by the widow of S. Mukund Singh for Rs. 12,500 for arrears of rent and for eviction, and in the written statement made by the petitioner in that suit he has alleged that the Court of Wards is being specially continued to save the application of the ceilings on land to the property left by S. Mukund Singh. The petitioner has also claimed in that suit that if the arrears of rent have to be paid, they are payable only by S. Surrinder Singh and S. Ranjit Singh Grewal. This has annoyed them. Further, while he was in jail, S. Surrinder Singh with police force took possession of the lands in September, 1960, and though a criminal complaint was filed against S. Surrinder Singh for threatening the petitioner's wife with a gun, the complaint was dismissed by the Court for default of appearance of the petitioner as he was in jail and could not attend it. He alleged that the Superintendent, Jail, has purposely referred these cases to the Magistrate instead of dealing with them himself, so that a severe punishment might be imposed upon the petitioner, and the intention is to keep him in jail, so that he may be kept away from his lands, his property and his other amenities.

These further allegations, which have not been either admitted or denied, are of a very serious character, and one would have expected that an affidavit in reply would have been filed at least in respect of some of them, as for example, that the Magistrate had asked for excessive bail, or that the criminal complaint stood dismissed because the petitioner could not attend his case. These allegations could have been either admitted or stated to be false after looking into the records of the case. Further the personal aspersions against the Chief Minister and the Senior Superintendent of Police, Amritsar, who have been charged with improper conduct by taking advantage of their official position, should have been denied by them on affidavit, if they were untrue.

In the absence of any specific denial on the part of the State, the Chief Minister and the Superintendent of Police concerned, we must reluctantly go by the affidavit filed by the petitioner. In proceedings of this kind, it should be known that the Court does not examine witnesses in support of allegations of fact made by either side. Ordinarily, the Court acts upon the affidavit of one side or that of the other. But if one side omits to make an affidavit in reply the affidavit of the other side remains uncontroverted.

In the present case, the petitioner has asked for the transfer of the cases from the State of Punjab; and his allegation is that as there is no separation of the Judiciary from the Executive, the magistracy is under the control of the Executive and he would not get justice at the hands of any Magistrate in the State. No doubt, an allegation of this type cannot be accepted, because it is impossible to think that there is no Magistrate in the whole State who can rise above pressure, if any, brought by the Executive. However, the question is not one of finding such a Magistrate and entrusting the cases to him. The question really is whether the petitioner can be said to entertain reasonably an apprehension that he would not get justice. One of the highest principles in the administration of law is that justice should not only be done but should be seem to be done. In the present case, there is enough allegation to show that certain strong parties are opposed to the petitioner in various ways. Whether they would exercise any influence upon the magistracy and whether the magistracy would be able to withstand such a pressure, if made, is not germane to the present petition. We are of opinion that the petitioner has, by his affidavit,

made out sufficient circumstances from which it can be inferred that he does entertain, and entertain reasonably, an apprehension that he would not get justice in these cases. In similar circumstances, this Court has not hesitated on an earlier occasion to transfer certain cases outside the State of Punjab. In our opinion, the present case is also one in which the interests of justice demand that the cases should be transferred outside the State of Punjab. We direct that the two cases shall be transferred to Saharanpur District and shall be tried there by a Magistrate who shall be chosen by the District Magistrate of Saharanpur for their disposal according to law.

K.S.

Petition allowed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—S. K. DAS, *Acting Chief Justice*, K. SUBBA RAO, RAGHUBAR DAYAL, N. RAJAGOPALA AYYANGAR AND J. R. MUDHOLKAR, JJ.

South India Corporation (P.) Ltd.

Appellant*

v.

The Secretary, Board of Revenue, Trivandrum and another . . . Respondents.

Constitution of India (1950), Articles 277, 278, 372—Scope and construction—Saving of levy of taxes etc., Part B State Government—State ceasing to have power to levy taxes under an agreement between the Centre and the State—Article 372—Provision saving pre-Constitution valid laws—General provision—Article 277 saving levy of taxes, etc., a special provision—Article 278—Non-obstante clause—Interpretation—Agreement under Article 278 prevails over provisions in other Articles of Constitution—Travancore and Cochin General Sales Tax Act (XI of 1950)—No power in the State to levy tax preserved after the agreement under Article 278—Omission of Article 278 by Constitution (Seventh Amendment) Act, 1956—Validity of agreement under Article 278 not affected—Validity depends upon power at the time the agreement was entered into.

Under Article 277 of the Constitution any taxes that were being lawfully levied by the Government of any State before the Constitution could be continued to be levied thereafter, notwithstanding that the said taxes were mentioned in the Union List, till Parliament made a law to the contrary.

The effect of the provisions in Article 278 is that to the extent covered by an agreement entered into between Centre and State Government (Part B) the power of the State Government to continue to levy taxes under Article 277 was superseded.

The effect of the agreement, was the loss arising to the State on account of the federal financial integration in the State was ascertained and a provision was made for subsidizing the State by filling up the said revenue gap. The agreement *ex facie* appears to be a comprehensive one. It takes into consideration the entire loss caused to the State by reason of some of its sources of revenue being transferred under the Constitution to the Union.

There is no force in the contention that as Article 278 was omitted by the Constitution (Seventh Amendment) Act, 1956, the agreement entered into in exercise of a power thereunder automatically came to an end and thereafter the power of the State to levy the tax came into life again. The validity of an agreement depends upon the existence of power at the time it was entered into. Its duration will be limited by its terms or by the conditions imposed on the power itself. Article 278 conferred a power upon the Union and the Part B State to enter into an agreement which would continue in force for a period not exceeding ten years from the commencement of the Constitution. The agreement in question fell squarely within the scope of the power. That agreement, therefore, would have its full force unless the Constitution (Seventh Amendment) Act, 1956, in terms avoided it. The said amendment was only prospective in operation and it could not have, affected the validity of the agreement.

The impugned assessment orders were not validly made by the Sales Tax Authorities in exercise of the power saved under Article 277 of the Constitution.

A pre-Constitution law made by a competent authority, though it has lost its legislative competence under the Constitution, shall continue in force, provided the law does not contravene the other provisions of the Constitution.

Article 372 is a general provision ; and Article 277 is a special provision. It is settled law that a special provision should be given effect to the extent of its scope, leaving the general provision to control cases where the special provision does not apply. The Constitution gives a separate treatment to the subject of finance, and Article 277 saves the existing taxes, etc., levied by States, if the conditions mentioned therein are complied with. While Article 372 saves all pre-Constitution valid laws, Article 277 is confined only to taxes, duties, cesses or fees lawfully levied immediately before the Constitution. Therefore, Article 372 cannot be construed in such a way as to enlarge the scope of the saving of taxes, duties, cesses or fees. To state it differently, Article 372 must be read subject to Article 277. An agreement can be entered into between the Union and the States in terms of Article 278 abrogating or modifying the power preserved to the States under Article 277.

Even if Article 372 continues the pre-Constitution laws of taxation, that provision is expressly made subject to the other provisions of the Constitution. The expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Further Article 278 opens out with a *non-obstante* clause. The phrase "notwithstanding anything in the Constitution" is equivalent to saying that in spite of the other articles of the Constitution, or that the other articles shall not be an impediment to the operation of Article 278.

Notwithstanding the fact that a pre-Constitution taxation law continues in force under Article 372 the Union and the State Government can enter into an agreement in terms of Article 278 in respect of Part B States depriving the State Law of its efficacy.

Appeals from the Judgment and Order dated 3rd February, 1961, of the Kerala High Court in O. Ps. Nos. 232 of 1957, 70, 71 and 673 of 1960.

M. K. Nambiar, Senior Advocate, (J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant: (In all the Appeals).

V. P. Gopalan Nambiar, Advocate-General for the State of Kerala, (Sardar Bahadur, Advocate, with him), for Respondents. (In all the Appeals).

The Judgment of the Court was delivered by

Subba Rao, J.—These four companion appeals arise out of a common judgment of the High Court of Kerala dismissing the four petitions filed by the appellant seeking to quash the orders of assessment made by the Sales Tax Authorities imposing sales tax in respect of "works contracts".

The undisputed facts may briefly be stated. The appellant is a private limited company incorporated under the Indian Companies Act. The principal office of the Company is at Mattancherry. It carries on business in iron, hardware, electrical goods, timber, coir, engineering contracts etc. In the course of its business, the Company acted as engineering contractor for the State and Central Government Departments and also for private parties. On 17th March, 1959, the Sales Tax Officer, Special Circle, Ernakulam, assessed the Company to sales tax under the Travancore-Cochin General Sales Tax Act, 1125 M. E. for the assessment year 1952-53 in respect of "works contracts". The Company filed a revision petition before the 1st respondent, but it was rejected. Likewise the 2nd respondent assessed the Company to sales tax by his orders dated 7th January, 1960, 4th January, 1960, and 31st March, 1960, for the assessment years 1956-57, 1957-58 and 1958-59 in respect of "works contracts". The appellant filed four petitions in the High Court of Kerala under Articles 226 and 227 of the Constitution for quashing the said orders of assessment. The main contention advanced on behalf of the appellant-Company before the High Court was that, after the Constitution came into force the relevant Sales Tax Acts imposing sales tax on "works contracts" were unconstitutional and, therefore, void. The High Court rejected the contention and dismissed the petitions with costs. Hence the appeals.

Before advertng to the rival contentions it would be convenient at the outset to give briefly the historical background of the sales tax legislation in Kerala.

Originally, Travancore and Cochin were two separate sovereign States having plenary powers of taxation. In the Cochin State, the Cochin General Sales Tax Act XV of 1121, M.E. and in the Travancore State, the Travancore General Sales Tax Act XVIII of 1124, M. E. imposed tax on "works contracts". As a result of the merger of the two States, the United State of Travancore-Cochin was formed with a common Legislature. The said Legislature enacted the Travancore-Cochin General Sales Tax Act XI of 1125, M.E. (1950) hereinafter called the Act. The said Legislature also had plenary powers of taxation and, therefore, it validly imposed sales tax on "works contracts". The Act was published in the Gazette on 17th January, 1950, but section 1 (3) thereof provided that it would come into force on such date as the Government might, by notification in the Gazette, appoint. The requisite notification was issued by the Government on 30th May, 1950. Rules were framed under powers conferred by section 24 of the Act prescribing the mode, *inter alia*, for ascertaining the amounts for which goods were sold in relation to "works contracts". Rules 4 (3) provided that,

"For the purposes of sub-rule (1) the amount for which goods are sold by a dealer shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue from time to time for different areas representing the usual proportion in such areas of the cost of labour to the cost of materials used in carrying out such contract, subject to the following maximum percentages :—

* * * * *

But, it is stated that the Board of Revenue did not fix the percentage for deduction from the amount payable to the dealer for carrying out a works contract. This fact was not denied in the High Court, but before us an application is made to produce the Travancore-Cochin Gazette to establish that such a percentage was fixed. The Rules also were notified on 30th May, 1950. The earlier Acts of Travancore and Cochin were repealed from 30th May, 1950. Till 30th May, 1950, sales tax was levied on works contracts in Travancore and Cochin areas under the respective Acts and the Rules framed thereunder. As from the said date the said Acts were repealed, thereafter the said tax was imposed under the Act and the Rules framed thereunder. On 1st November, 1956, the States Reorganization Act of 1956 came into force and the new State of Kerala was formed thereunder. The newly formed Kerala State comprised the area covered by the Travancore-Cochin State, excepting a small part thereof, and the district of Malabar in the Madras State. Thereafter, the Kerala Legislature passed the Travancore-Cochin General Sales Tax (Amendment) Act, 1957 (XII of 1957) amending the Act and extending its provisions to the whole State of Kerala. The new Act practically contained the provisions of the earlier Act. The said Act came into force on 1st October, 1957. By the provisions of Act XII of 1957, among other things, the tax on electric goods was enhanced from 3 nP. to 4 nP. in the rupee and in regard to cement, this item was freshly added and charged to sales tax at 5 nP. in the rupee. The State of Kerala does not admit that either there was any enhancement of tax in the case of electrical goods or that any tax was imposed in regard to cement involved in a works contract. Further, the sales tax leviable under the Act was enhanced by the Kerala Surcharge on Taxes Act, 1957 (XI of 1957) and again by the Kerala Surcharge on Taxes Act, 1960. We are not concerned with the latter Act, as no assessment was made under that Act in respect of any of the transactions in question.

The factual position may, therefore be stated thus : The assessment for the year 1952-53 was made only under the Travancore-Cochin General Sales Tax Act (XI of 1125, M.E.) and therefore, the subsequent alleged enhancement of the tax does not affect the assessment of that year. Assessments for the years 1956-57, 1957-58 and 1958-59 were made under the Travancore-Cochin General Sales Tax (Amendment), Act, 1957 (XII of 1957) and, therefore, the provision, if any, enhancing the rate under the Act would affect the said assessments. The enhancements made under the Kerala Act XI of 1957 would not govern the assessment year 1956-57, but only the assessment years 1957-58 and 1958-59.

The material contentions of Mr. Nambiar, appearing for the appellant may be summarized thus ; (1) The Travancore-Cochin Act of 1125 would not continue in force under Article 372 of the Constitution inasmuch as its provisions were inconsistent with the structure of the Constitution as well as with the provisions of Part XII thereof ; (2) Article 277 of the Constitution cannot be relied upon by the respondent, as it can be availed of only : (a) if a particular tax was lawfully levied by the Government of the State immediately before the Commencement of the Constitution and is expressly mentioned in the Union List, and (b) if there is an identity between the tax imposed by the State before the Constitution and that continued by it thereafter in respect of rate, area, State and purpose. It is said that the said two conditions are not satisfied. (3) Assuming that Article 277 applied, the said provision could not be relied upon by the appellant in view of the agreement entered into between the Rajpramukh of Travancore and the Union Government under Article 278 of the Constitution. (4) The impugned Act, insofar as it imposed tax in respect of "works contract" would offend Article 14 of the Constitution inasmuch

as it was not applied to areas other than those covered by the Travancore-Cochin States and, therefore, discriminatory in its application. And (5) in any view, in respect of the assessment year 1952-53 the non-fixation of the percentage by the Board of Revenue under rule 4 (3) of the Rules made under the Act renders the said assessment illegal.

The learned Advocate-General of Kerala counters some of the said arguments. We shall refer to his arguments in the course of the judgment at appropriate places. It may be mentioned at this stage that the learned Advocate-General conceded that the assessment orders for the years 1956-57, 1957-58 and 1958-59 made under the Travancore-Cochin General Sales Tax (Amendment) Act, 1957 (XII of 1957) and the Kerala Surcharge on Taxes Act (XI of 1957) were bad, but prayed that the State might be given liberty to assess the appellant *de novo* for the said years under the Act.

The main contention of learned Counsel for the appellant centres on the provisions of Articles 277 and 278 of the Constitution. Under Article 277, any taxes that were being lawfully levied by the Government of any State before the Constitution could be continued to be levied thereafter, notwithstanding that the said taxes were mentioned in the Union List, till Parliament made a law to the contrary. Article 278 enables the Government of India and a State Government specified in Part B of the First Schedule to the Constitution to enter into an agreement with respect to levy and collection of any tax leviable by the Government of India in such State and for the distribution of the proceeds thereof and also in respect of the grant of any financial assistance by the Government of India to such State if it incurred any loss of revenue derived by it from any source. Under clause (2) thereof, such an agreement shall continue in force for a period of ten years from the commencement of the Constitution. We are not concerned here with the legal position after the expiry of the said period, and we do not propose to express our view thereon.

The first contention of learned Counsel for the appellant is that Article 277 of the Constitution can only save the levy of a tax that was being lawfully levied by a State immediately before the commencement of the Constitution and that, as the Act came into force only after the Constitution, the levy made thereunder does not satisfy the condition laid down by the article. To appreciate this contention some relevant facts may be recapitulated. The Act was published in the Gazette on 17th January, 1950, but was brought into force only on 30th May, 1950, i.e., after the commencement of the Constitution. If so, it follows that the tax under the Act would not be saved, as the necessary condition that the levy should have been lawfully made before the Constitution was not satisfied.

On the assumption that Article 277 saved the levy of tax under the Act, the further contention of the appellant is that there was an agreement dated 25th February, 1950, between the President of India and the Rajpramukh of the State of Travancore-Cochin in the matter of the federal financial integration in the said State and that under the said agreement the Union agreed to recoup the loss in revenue incurred by the said State by reason of the constitutional transference of the B State's power of taxation in respect of certain items to the Union List and that, thereafter, the State ceased to have the power to levy any tax in respect of the subjects so transferred. The learned Advocate-General, on the other hand, contends that Article 278 (2) enables the Union and a B State to enter into an agreement only in respect of a tax leviable by the Government of India in the said State and in respect whereof a loss has been incurred by the State by reason of the fact that under the Constitution it has ceased to have the power to levy and collect the said tax, and that, as in the instant case by reason of Article 277 the State would continue to have the power to levy the tax in respect of "works contracts" till Parliament made appropriate law, it did not incur any loss in respect of the said tax and, therefore, no valid agreement could be entered into between the State Government and the Union in respect thereof. To state it differently, Article 278 does not come into play unless the Government of India acquires the power to levy a particular tax saved by Article 277 by Parliament making an appropriate law; for, it is said, with some force,

there cannot be an agreement to recoup any loss of revenue when there is no such loss. But this question is covered by a decision of this Court in *Union of India v. Maharaja Krishanagarh Mills Ltd.*¹. There, the question for determination was whether the Union of India was entitled to levy and recover arrears of excise duty on cotton cloth for the period 1st April, 1949, to 31st March, 1950, payable by the respondent, a cloth mill in the State of Rajasthan, under the Rajasthan Excise Duties Ordinance, 1949. By reason of Article 277 of the Constitution, the State of Rajasthan became entitled to recover the said duty notwithstanding the fact that it was transferred to the Union List. The provision to the contrary contemplated by Article 277 of the Constitution was made by Finance Act XXV of 1950, section 11 whereof extended the Central Excise and Salt Act, 1944, along with other Acts, to the whole of India except the State of Jammu and Kashmir. That section had effect only from 1st April, 1950, and did not apply to arrears of duty of excise in regard to the earlier period. The Union pleaded that an agreement envisaged by Article 278 was entered into on 25th February, 1950, which conceded to the Centre the right to levy and collect the arrears of duty in question. The question now raised before us, namely, whether there can be a valid agreement under Article 278 of the Constitution in respect of taxes leviable by the State and not leviable by the Government of India till an appropriate law is made by Parliament arose for consideration in that case. The learned Chief Justice, speaking for the Court, came to the following conclusion, at page 535 :

"Thus the combined operation of Articles 277 and 278 read with the agreement vests the power of levy and collection of the duty in the Union of India."

The reasons for the conclusion are found at page 533 :

"It is noteworthy that the provisions of Article 278 override *pro tanto* other provisions of the Constitution including Article 277 and the terms of the agreement override the provisions of the Chapter namely, Chapter I of Part XII.....Article 277 therefore, is in the nature of a saving provision permitting the States to levy a tax or a duty which, after the Constitution could be levied only by the Centre. But Article 277 must yield to any agreement made between the Government of India and the Government of a State in Part B in respect of such taxes or duties, etc."

The learned Chief Justice proceeded to state thus at page 535 :

"That a duty of the kind now in controversy on the date of the agreement after coming into force of the Constitution is leviable only by the Government of India even in respect of the State of Rajasthan is clear beyond all doubt. (The Union List only, namely, Entry 84 in the Seventh Schedule, authorises the levy and collection of the duty in question..... It is true that Article 277 has saved, for the time being, until Parliament made a provision to the contrary, the power of the State of Rajasthan to levy such a duty, but that is only a saving provision, in terms subject to the provisions of Article 278."

This Court, therefore, held that after the coming into force of the Constitution the excise duty in question in that case was leviable only by the Government of India, though there was a saving provision in favour of the State of Rajasthan till Parliament made an appropriate law ; and on that reasoning it held that the agreement under Article 278 could be made in respect of such a levy notwithstanding the temporary reservation made in favour of the State. The only difference between that case and the present one is that at the time the agreement was entered into between the Union and the State, Parliament had not made the appropriate law depriving the State of its power to levy taxes in respect of "works contracts". But that cannot make any difference in principle, for, even the earlier decision related only to the validity of the agreement in respect of arrears leviable by the State before the appropriate law was made. The effect of the provisions in Article 278 is that to the extent covered by an agreement the power of the State Government to continue to levy taxes under Article 277 was superseded.

The next question is whether there was any such agreement whereunder the State agreed to give up its right to levy the said tax as a part of the agreement entered into by it with the Union. This leads us to consider the terms of the agreement dated 25th February, 1950, entered into between the President of India and the Rajpramukh of the State of Travancore-Cochin. It would be convenient to read the relevant clauses of the agreement. It reads :

" WHEREAS provision is made by Articles 278, 291, 295 and 306 of the Constitution of India for certain matters to be governed by agreement between the Government of India and the Government of a State specified in Part B of the First Schedule to the Constitution :

Now, therefore, the President of India and the Rajpramukh of Travancore-Cochin, have entered into the following agreement, namely :—

The recommendations of the Indian State Finances Enquiry Commission, 1948-49 (hereafter referred to as the Committee) contained in Part I of its Report read with Chapters I, II, III of Part II of its Report, in so far as they apply to Travancore-Cochin (hereinafter referred to as the State) together with the recommendations contained in the Committee's Second Interim Report, are accepted by the parties thereto, subject to the following modifications, namely :—

(1) With reference to paragraph 6 of the Committee's Second Interim Report, the date of federal financial integration of the State shall be 1st April, 1950.

(2)

(3) The Committee's formula of guaranteeing the 'federal' revenue gap for the first five years after federal financial integration and of tapering it down over the next five years will be applied to the combined 'federal' revenue gap of the former Indian States, Travancore and Cochin, taken together, computed as in (2) above.

Subject to the provisions of the Constitution of India, this agreement, shall, except where the context of the Committee's Report and of this agreement otherwise require, remain in force for a period of ten years from the commencement of the Constitution of India."

It will be seen from the said agreement that it incorporated the recommendations made by the Indian State Finance Enquiry Committee with some modifications and that the Union of India agreed to recoup the State for the loss caused to it by reason of the federal financial integration in the manner described thereunder. It was not a piecemeal agreement confined to a few items, but a comprehensive one to fill up the entire revenue gap caused to the State by reasons of some of its sources of revenue having been taken away by the Union or otherwise lost to it. A perusal of the main recommendations made by the Indian States Finance Enquiry Committee and incorporated in the agreement also indicates the completeness of the arrangement. The Committee was asked to examine and report, *inter alia*, whether, and if so, the extent to which, the process of so integrating Federal Finance in the Indian States and Union with that of the rest of India should be gradual and the manner in which it should be brought about. One of the general principles followed by the Committee was that federal financial integration in States involved not merely the taking over of all their "federal" revenues by the Centre, but also the assumption of all expenditure in States upon Departments and Service of a 'federal' character. In Chapter II of Part II, which dealt with "Specific matter concerning 'Federal' Revenues and 'Federal' Service Departments", it was stated that with effect from the prescribed date, the Centre will take over all 'federal' sources of Revenue and all 'federal' items of expenditure in States, together with the administration of the Departments concerned and that the Centre must also take over all the current outstandings, liabilities, claims, etc., and all productive and unproductive Capital assets connected with these Departments. Dealing with the States' rights it observed :

"With effect from the prescribed date, all 'rights and immunities' enjoyed or claimed by the States, whether expressly or by usage and whether relating to 'federal' revenues and taxes generally present or future, or to specific matters such as Railways, Customs, Posts and Telegraphs, Opium, Salt, etc., will terminate and must be extinguished. Thereafter, their constitutional position in respect of these matters should be the same as that of Provinces under the new Constitution of India.

The Committee recommended that the whole body of State legislation as to 'federal' subjects should be repealed and the corresponding body of Central legislation extended *proprio vigore* to the States, with effect from the prescribed date, or as and when the administration of particular 'federal' subject is assumed by the Centre. In its Second Interim Report, dealing with Travancore and Cochin, the following recommendations were made :

“Revenue gap” arising out of ‘Federal’ Financial Intergration :

(i) The net revenue loss to the Travancore and Cochin States, taken together upon federal financial integration (on the basis of figures for their financial years 1123, M.E.) would be Rs. 330 lakhs; this includes a net loss of Rs. 100 lakhs by abolition of Internal Customs Duties in Travancore State.

(ii) We recommend that—

(a) the loss resulting from the immediate abolition of Internal Customs Duties of Travancore must be borne by the State Government.

(b) as regards the residual net Central Revenue gap of the two States taken together (Rs. 230 lakhs), there should be a guaranteed re-imbusement by the Central Government to the following extent during a transitional period ;

From the date of federal financial integration Rs. 230 lakhs per annum to 31st March, 1955.

The agreement, read with the Report makes the following position clear : The loss arising to the State on account of the federal financial integration in the State was ascertained and a provision was made for subsidizing the State by filling up the said revenue gap. The agreement *ex facie* appears to be a comprehensive one. It takes into consideration the entire loss caused to the State by reason of some of its sources of revenue being transferred under the Constitution to the Union. It would be unreasonable to construe the agreement as to exclude from its operation certain taxes which the State was authorized to levy for a temporary period. As we have said, that saving was subject to an agreement and, as by the agreement effective adjustments were made to meet the loss which the State would have incurred but for the agreement, there was no longer any necessity for the continuance of the saving and, it ceased to have any force thereafter between the parties to the agreement. We are not called upon in this case to decide whether the said power revived after the expiry of ten years from the commencement of the Constitution, for all the impugned assessments fall within the said period. Nor do we find any force in the contention that as Article 278 was omitted by the Constitution (Seventh Amendment) Act, 1956, the agreement entered into in exercise of a power thereunder automatically came to an end and thereafter the power of the State to levy the tax came into life again. An obvious fallacy underlies this ingenious argument. The validity of an agreement depends upon the existence of power at the time it was entered into. Its duration will be limited by its terms or by the conditions imposed on the power itself. Article 278 conferred a power upon the Union and the B State to enter into an agreement which would continue in force for a period not exceeding ten years from the commencement of the Constitution. The agreement in question fell squarely within the scope of the power. That agreement, therefore, would have its full force unless the Constitution (Seventh Amendment) Act, 1956, in terms avoided it. The said amendment was only prospective in operation and it could not have, affected the validity of the agreement. We, therefore, hold that the impugned assessment orders were not validly made by the Sales Tax Authorities in exercise of the power saved under Article 277 of the Constitution.

Learned Advocate-General for the State of Kerala raises an interesting point, namely, that the impugned law, *i.e.*, the Travancore-Cochin General Sales Tax Act of 1125, M.E. continued in force after the Constitution under the express provisions of Article 372 thereof till the said law was altered, repealed or amended by the competent authority and, therefore, even if there was an agreement between the Union and the State as aforesaid, it could not affect the power of the State to impose the tax under the said law.

Mr. Nambiar, on the other hand, argues that Article 372 is subject to other provisions of the Constitution and a law empowering a State to impose a tax in respect of a federal subject is inconsistent with the federal structure of the Constitution and, therefore, is bad ; and, that apart, it is also inconsistent with the express provisions of Part XII of the Constitution and particularly with those of Articles 277 and 278 thereof. Article 372 reads :

“(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the law in force in the territory of India

immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority.

* * * * *

Explanation I.—The expression “law in force” in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.”

The object of this article is to maintain the continuity of the pre-existing laws after the Constitution came into force till they were repealed, altered or amended by a competent authority. Without the aid of such an article there would be utter confusion in the field of law. The assumption underlying the article is that the State laws may or may not be within the legislative competence of the appropriate authority under the Constitution. The article would become ineffective and purposeless if it was held that pre-Constitution laws should be such as could be made by the appropriate authority under the Constitution. The words “subject to the other provisions of the Constitution” should, therefore, be given a reasonable interpretation, an interpretation which would carry out the intention of the makers of the Constitution and also which is in accord with the constitutional practice in such matters. The article posits the continuation of the pre-existing laws made by a competent authority notwithstanding the repeal of Article 395; and the expression “other” in the article can only apply to provisions other than those dealing with legislative competence.

The learned Advocate-General relied upon the following decisions for the said legal position: *Messrs. Gannon Dankerly and Co. v. Sales Tax Officer, Matancherry*¹; *Sagar Mall v. State*²; *Kanpur Oil Mills v. Judge (Appeals) Sales Tax, Kanpur*³; *The Amalgamated Coalfields Ltd. v. The Janapada Sabha, Chhindwara*⁴; *Jagdish Prasad v. Saharanpur Municipality*⁵; *Sueoshankar v. M. P. State*⁶; *State v. Tash Pal*⁷; and *Binoy Bhushan v. States of Bihar*⁸. It is not necessary to consider in detail the said decisions, as they either resume the said legal position or sustain it, but do not go further. They held that a law made by a competent authority before the Constitution continues to be in force after the Constitution till it is altered or modified or repealed by the appropriate authority, even though it is beyond the legislative competence of the said authority under the Constitution. We give our full assent to the view and hold that a pre-Constitution law made by a competent authority, though it has lost its legislative competency under the Constitution, shall continue in force, provided the law does not contravene the “other provisions” of the Constitution.

But the real question is whether the said impugned law is inconsistent with the provisions of the Constitution other than those dealing with its legislative competency. The words “subject to other provisions of the Constitution” mean that if there is an irreconcilable conflict between the pre-existing law and a provision or provisions of the Constitution, the latter shall prevail to the extent of that inconsistency. An article of the Constitution by its express terms may come into conflict with a pre-Constitution law wholly or in part; the said article or articles may also, by necessary implication, come into direct conflict with the pre-existing law. It may also be that the combined operation of a series of articles may bring about a situation making the existence of the pre-existing law incongruous in that situation. Whatever it may be, the inconsistency must be spelled out from the other provisions of the Constitution and cannot be built up on the supposed political philosophy underlying the Constitution. These observations are necessitated by the reliance of Mr. Nambiar on two decisions of the Supreme Court of the United States America. In *Chicago, Rock Island and Pacific Railway Company v. William McGlinn*⁹, the facts, briefly were:

1. I.L.R. (1957) Ker. 462.

2. I.L.R. (1952) 1 All. 862.

3. A.I.R. 1955 All. 99.

4. (1962) 1 S.C.R. 1; (1961) 1 S.C.J. 445.

5. A.I.R. 1961 All. 583.

6. A.I.R. 1951 Nag. 58.

7. A.I.R. 1957 Pun. 91.

8. A.I.R. 1954 Patna 346.

9. (1884) 29 L.Ed. 270.

The Act of Kansas purported to cede to the United States exclusive jurisdiction over the Fort Leavenworth Military Reservation. In considering the question whether the previous laws continued after the said cession, the Supreme Court of the United States of America made a distinction between laws of political character and municipal laws intended for the protection of private rights, but we are not concerned with that question in this case; and indeed the law of India appears to be different from that of America in that regard. But what is relied upon is the effect of cession on pre-existing laws which are in conflict with the political character, institution and Constitution of the new Government. Field, J., speaking for the Court observed, at page 272 as follows:

"As a matter of course, all laws, ordinances and regulations in conflict with the political character, institution and Constitution of the new Government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new Government upon the same matters."

The same view was reiterated by the Supreme Court of the United States of America in a latter decision in *Vilas v. City of Manila*¹. We are not concerned in this case with the general principles enunciated by the law of America, but only with the express provisions of Article 372 of our Constitution. That apart, it may also be inappropriate to rely upon the legal consequences of a cession of a State under the American law for the interpretation of Article 372 of our Constitution, which deals with a different situation and lays down expressly the legal position to meet the same. We would, therefore, confine our attention to the express provisions of the Constitution in considering the question raised before us.

The relevant provisions which have a bearing on the said question are found in Part XII of the Constitution. Chapter I deals with finance; and this chapter contains a scheme of federal financial integration in the States. Though the Constitution conferred upon the Union and the States independent powers of taxation and constituted separate consolidated funds, it evolved a procedure for an equitable readjustment of the taxes collected between the Union and the State. But before the Constitution came into force the States were levying and collecting certain taxes which, under the Constitution, were allotted to the Union. The immediate exercise of the Union power of taxation in respect of such taxes would dislocate the finances of the States and introduce difficulties in the administration. To avoid this, Article 277 saved the existing taxes levied by the States, though they have been transferred to the Union List by the Constitution, till Parliament made appropriate law. But the Constitution was also made applicable to Part B States. They had plenary powers of taxation. Their relationship with the paramount power differed from State to State. Further, most of the States were in a state of financial instability and required substantial help from the Union to bring them up to the standard of Part A States. There would be a serious dislocation in the administration of the said States by a sudden withdrawal of the federal sources of revenue. The provisions of Part XII of the Constitution, with the saving embodied in Article 277, may have met the situation obtaining in Part A States, but they were inadequate for Part B States. Therefore, a special provision under Article 278 was made in respect of Part B States enabling them to enter into an agreement with the Union embodying terms contrary to the other provisions of the Constitution in respect of levy and collection of taxes and the grant of any financial assistance to such State or States.

With this background let us now consider the following two questions raised before us: (1) Whether Article 372 of the Constitution is subject to Article 277 thereof; and (2) whether Article 372 is subject to Article 278 thereof. Article 372 is a general provision; and Article 277 is a special provision. It is settled law that a special provision should be given effect to the extent of its scope, leaving the

general provision to control cases where the special provision does not apply. The earlier discussion makes it abundantly clear that the Constitution gives a separate treatment to the subject of finance, and Article 277 saves the existing taxes etc. levied by States, if the conditions mentioned therein are complied with. While Article 372 saves all pre-Constitution valid laws, Article 277 is confined only to taxes, duties, cesses or fees lawfully levied immediately before the Constitution. Therefore, Article 372 cannot be construed in such a way as to enlarge the scope of the saving of taxes, duties, cesses or fees. To state it differently, Article 372 must be read subject to Article 277. We have already held that an agreement can be entered into between the Union and the States in terms of Article 278 abrogating or modifying the power preserved to the States under Article 277.

That apart, even if Article 372 continues the pre-Constitution laws of taxation, that provision is expressly made subject to the other provisions of the Constitution. The expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Further Article 278 opens out with a *non-obstante* clause. The phrase "notwithstanding anything in the Constitution" is equivalent to saying that in spite of the other articles of the Constitution, or that the other articles shall not be an impediment to the operation of Article 278. While Article 372 is subject to Article 278, Article 278 operates in its own sphere in spite of Article 372. The result is that Article 278 overrides Article 372; that is to say, notwithstanding the fact that a pre-Constitution taxation law continues in force under Article 372, the Union and the State Governments can enter into an agreement in terms of Article 278 in respect of Part B States depriving the State law of its efficacy. In one view Article 277 excludes the operation of Article 372, and in the other view, an agreement in terms of Article 278 overrides Article 372. In either view, the result is the same, namely, that at any rate during the period covered by the agreement the States ceased to have any power to impose the tax in respect of "works contracts."

In this view we need not express our opinion on the other contentions raised by Mr. Nambiar.

In the result, the said orders of assessment are set aside and the appeals are allowed with costs here and in the High Court. One set of hearing fee.

V.S.

Appeals allowed;

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT — P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO, J.C. SHAH AND RAGHUBAR DAYAL, JJ.

Babu Lal

.. *Appellant**

v.

The State of Uttar Pradesh and others

.. *Respondents.*

Criminal Procedure Code (V of 1898), section 479-A—Applicability—Limits.

It is clear from sub-section (6) of section 479-A, Criminal Procedure Code, that the procedure prescribed thereby alone applies if the case falls within sub-section (1). But sub-section (1) has a limited operation; it applies only to the prosecution of a witness appearing before the Court, who has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. The sub-section may therefore be resorted to only in a case which falls within the first paragraph of section 193 of the Indian Penal Code and allied sections 194 and 195—when it is committed by a witness appearing before a Court. The offence penalised under section 471, Indian Penal Code can never be covered by sub-section (1) of section 479-A. Therefore for taking proceedings against a person who is found to have used a false document dishonestly or fraudulently in any judicial proceeding, resort may only be had to section 476, Criminal Procedure Code, and section 479-A is not applicable.

Sahabir Hussain Bholu v. State of Maharashtra, A.I.R. (1963) S.C. 816 at 820, explained.

Appeal by Special Leave from the Judgement and Order dated 31st January, 1962, of the Allahabad High Court in Civil Revision No. 60 of 1960.

C. B. Agarwala, Senior Advocate, (*K. P. Gupta*, Advocate for *K. R. Krishnaswamy*, Advocate with him), for Appellant.

G. P. Lal, Advocate, for Respondent No. 1.

S. P. Sinha, Senior Advocate, (*M. I. Khawaja*, Advocate, with him), for Respondents Nos. 2 to 5.

The Judgment of the Court was delivered by

Shah, J.—Jairam and three others—hereinafter collectively called “the plaintiffs”—sued Babu Lal—appellant in this appeal—in the Court of the Munsiff, Koil, District Aligarh, for a decree for possession of a strip of land, for removal of a wall and a slab of stone and for an injunction restraining the making of certain constructions in the northern wall of the plaintiffs’ house. The plaintiffs claimed that Mohini, wife of Jairam the first plaintiff, had purchased the house occupied by them by sale deed dated 1st August, 1932, from the vendor who was also named Mohini, who in her turn had purchased the house by sale deed dated 25th July, 1917, from the original owner Kishan Lal.

Babu Lal who is the son of Kishan Lal pleaded that the vendor Mohini had acquired only a life interest in the house by the deed under which the property was conveyed to her by Kishan Lal and the plaintiffs’ predecessor-in-interest had acquired no title under the sale-deed dated 1st August, 1932. In support of this plea Babu Lal gave evidence at the trial of the suit and tendered in evidence an agreement dated 25th July, 1917, purported to be executed by Mohini to whom Kishan Lal had conveyed the house reciting that the sale deed in her favour was without consideration and that she had only a life interest in the house.

The Trial Judge held that the agreement relied upon by Babu Lal was “not genuine” and that Mohini predecessor-in-interest of the plaintiffs had under the sale-deed dated 1st August, 1932, acquired title to the house in dispute and on that footing decreed the suit. In appeal to the District Court the finding that the agreement was not genuine was not challenged.

Before the suit was disposed of by the Munsiff the plaintiffs had applied that action be taken against Babu Lal under section 479-A of the Code of Criminal Procedure, because Babu Lal had given false evidence before the Court, that he had forged the agreement relied upon by him, and that he had fabricated false evidence and had used such fabricated evidence at the trial, and had thereby committed offences punishable under sections 193, 209, 463 and 471 of the Indian Penal Code. The Munsiff did not dispose of the application by his judgment deciding the suit. After the disposal of the suit the plaintiffs moved the Munsiff for an order on the application filed by them. The Munsiff held that no action could be taken against Babu Lal for the offence of intentionally giving false evidence or intentionally fabricating false evidence for the purpose of being used in the suit for such action was barred by section 479-A, Code of Criminal Procedure, but in his opinion it was expedient in the interests of justice that a complaint be filed against Babu Lal for offences “under sections 463 and 471, Indian Penal Code.” Pursuant to this order on 30th May, 1959, a complaint was filed against Babu Lal charging him with committing an offence under section 471 read with section 463, Indian Penal Code, by using the agreement dated 25th July, 1917, knowing or having reason to believe that it was a forged document. The order passed by Trial Court was confirmed in appeal by the District Judge, Aligarh, and a revision application to the High Court of Allahabad challenging the order was dismissed. With Special Leave, Babu Lal has appealed to this Court.

Chapter XXXV of the Code of Criminal Procedure prescribes the procedure to be followed for prosecution of offenders in case of certain offences affecting the administration of justice. Section 476 sets out the procedure for prosecution of offenders for offences enumerated in section 195 (1) (b) and (c) of the Code of Criminal Procedure. If a Civil, Revenue or Criminal Court is of opinion, that it is expedient in the interests of justice that an enquiry be made into any offence referred to in section 195 (1) (b) or (c) which appears to have been committed in

or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing and forward the same to a Magistrate of the First Class having jurisdiction. Section 476-A authorises a superior Court to make a complaint where a Subordinate Court has omitted to do so in respect of offences and in the circumstances mentioned in section 476 (1). Section 476-B provides for a right of appeal against the order making or refusing to make a complaint. Sections 478 and 479 deal with the procedure which may be followed in certain grave cases. Section 479-A which was added by the Code of Criminal Procedure (Amendment) Act (XXVI of 1955) by the first sub-section (insofar as it is material) provides :

“Notwithstanding anything contained in sections 476 to 479 inclusive, when any Civil, Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing signed by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court is, false or fabricated and forward the same to a Magistrate of the First Class having jurisdiction, and may.....”

And sub-section (6) enacts that :

“No proceedings shall be taken under sections 476 to 479 inclusive for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken under this section.”

It is clear from the terms of sub-section (6) that the procedure prescribed thereby alone applies if the case falls within sub-section (1). But sub-section (1) has a limited operation : it applies only to the prosecution of a witness appearing before the Court, who has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. The sub-section may therefore be resorted to only in a case which falls within the first paragraph of section 193 of the Indian Penal Code and allied sections 194 and 195—when it is committed by a witness appearing before the Court.

Babu Lal was examined as a witness in the Civil suit filed by the plaintiffs. He tendered in evidence the agreement dated 25th July, 1917. In the opinion of the Munsiff the document was a forged document. The Munsiff however by his judgment disposing of the suit did not record an opinion that it was expedient for the eradication of the evils of perjury and fabrication of false evidence ; and in the interests of justice to prosecute Babu Lal for the offence of intentionally giving false evidence, or for intentionally fabricating false evidence for the purpose of being used at any stage of the judicial proceeding. He could not therefore after the disposal of the suit make a complaint for the offence of giving false evidence or fabricating false evidence. The Trial Court accepted this restriction upon its jurisdiction and directed in exercise of the powers vested under section 476, Criminal Procedure Code, the making of a complaint of an offence of fraudulently or dishonestly using as genuine a document which Babu Lal knew or had reason to believe to be a forged document.

It is urged by counsel for Babu Lal that a complaint for an offence under section 471, Indian Penal Code, may also be made under section 479-A, Code of Criminal Procedure, and not otherwise. The phraseology used in section 479-A is plain and unambiguous : it excludes the jurisdiction of the Court to proceed under sections 476 to 479, in respect of offences specified in section 195 (1) (b) and (c) of the Code of Criminal Procedure only where a person appearing before the Court as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. An offence punishable under section 471, Indian Penal Code, being one of fraudulently or dishonestly using as genuine any document which the accused knows or has reason to believe to be a forged document, does not fall

within the category contemplated by section 479-A (1) of the Code of Criminal Procedure and therefore the authority of the Court to act under section 476 of the Code is impaired by sub-section (6) of section 479-A. This Court in *Raghubir Prasad Dudhwalla v. Chamanlal Mehra and another*¹, observed :

"The special procedure of section 479-A is prescribed only for the prosecution of a witness for the act of giving false evidence in any stage of judicial proceeding or for fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding. There is nothing in the section which precludes the application of any other procedure prescribed by the Code in respect of other offences.

Examining the special procedure prescribed by section 479-A in that light, it is important to notice that the act of intentionally giving false evidence in any stage of a judicial proceeding and the act of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding mentioned in section 479-A of the Criminal Procedure Code are the acts which are made punishable under section 193 of the Indian Penal Code and cognate sections in Chapter XI."

It is true that some of the ingredients of the act of fabricating false evidence which is penalised under section 193, Indian Penal Code and of making a false document and thereby committing forgery within the meaning of sections 463 and 464, Indian Penal Code are common. A person by making a false entry in any book or record or by making any document containing a false statement may, if the prescribed conditions of section 463 are fulfilled, commit an offence of forgery. But the important ingredient which constitutes fabrication of false evidence within the meaning of section 192, Indian Penal Code beside causing a circumstance to exist or making a false document—to use a compendious expression—is the intention that the circumstance so caused to exist or the false document made may appear in evidence in a judicial proceeding, or before a public servant or before an arbitrator, and lead to the forming of an erroneous opinion touching any point material to the result of the proceeding. The offences of forgery and of fabricating false evidence for the purpose of using it in a judicial proceeding are therefore distinct and within the description of fabricating false evidence for the purpose specified in section 479-A, Criminal Procedure Code the offence of forgery is not included. In any event the offence penalised under section 471, Indian Penal Code, can never be covered by sub-section (1) of section 479-A. Therefore for taking proceeding against a person who is found to have used a false document dishonestly or fraudulently in any judicial proceedings, resort may only be had to section 476 Code of Criminal Procedure.

We may point out in the following observation made by this Court, in dealing with the true interpretation of section 479-A, Code of Criminal Procedure in *Shabir Hussain Bholi v. State of Maharashtra*², at page 820 :

"From this it would follow that whereas section 476 is general provision dealing with the procedure to be followed in respect of a variety of offences affecting the administration of justice, in so far as certain offences falling under sections 193 to 195 and section 471, Indian Penal Code, are concerned the Court before which that person has appeared as a witness and which disposed of the case can alone make a complaint."

the words "and section 471" appear to have crept in by oversight. That is clear from the observation made by the Court earlier in the judgment, that the discussion relating to the exclusive operation of section 479-A of the Code of Criminal Procedure was restricted to the offence of intentionally giving false evidence in any stage of judicial proceeding.

The appeal therefore fails and is dismissed. No order as to costs;

K.S.

Appeal dismissed.

1. Since reported (1964) 1 S.C.J. 415 : 2. A.I.R. 1963 S.C. 816 (820).
(1964) M.L.J. (Cri.) 233.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, K. C. DAS GUPTA AND RAGHUBAR DAYAL, JJ.

The New Asiatic Insurance Co., Ltd.
(In both appeals)

... Appellant *

Pessumal Dhanamal Aswani and others
(In both appeals)

... Respondents.

*Insurance—Motor Car insurance—Comprehensive policy—Construction—Liability of insurer to third parties for damages caused by accident in course of use by person driving with permission of owner of motor car who has effected the insurance—"Driver"—Person indemnified.**Motor Vehicles Act (IV of 1939) Chapter VIII, sections 94 and 95—Construction and scope of.*

Chapter VIII of the Motor Vehicles Act makes provision for insurance of the Vehicle against third party risks ; the provisions thereof ensure that third parties who suffer, on account of the use of the motor vehicle, would be able to get damages for injuries suffered and that their ability to get the damages will not be dependent on the financial condition of the driver of the vehicle whose use led to the causing of the injuries, and the provisions have to be construed in such a manner as to ensure this object of the enactment.

Section 94 of the Act requires that a policy of insurance must provide insurance against any liability to third parties incurred by the person using the vehicle when using it. The policy should be with respect to that particular vehicle i.e., it must be a policy by which a particular vehicle is insured though it may mention the person specifically or by specifying the class to which that person may belong.

Section 95 of the Act lays down the requirements to be complied with by the policy of insurance issued in relation to the use of a particular vehicle. The section, *inter alia*, makes the insurer liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons. If under the terms of the policy a person can be said to be the person insured under that policy, the insurer would be liable to satisfy the decree, if any, passed against that person, though he is not the person who effected the insurance.

A, who owned a Chevrolet car, insured it with the Appellant (Insurance company) under a policy dated 26th November, 1957. A permitted P to drive that car, and when P was driving it with two other persons in the car, it met with an accident as a result of which one of the two died and the other received injuries. The heirs of the deceased person, and the person who was injured claimed damages against P. Notices were issued to the Appellant Company under section 96 (2) of the Act which disputed its liability on the ground that P was not a person insured under the policy.

The policy, which was a private car (comprehensive Policy) *inter alia*, insured A, who effected the insurance in the event of accident caused by or arising out of the use of the car against all sums which he might become legally liable to pay in respect of death or of bodily injury to any person.

The company also undertook to indemnify any driver driving the motor car on the insured's order or with his permission provided that such driver was not entitled to indemnify under any other policy and observed, as though he were the insured, the terms, exceptions and conditions of the policy in so far as they can apply, and fulfilled and was to be subject to all the terms and conditions stated. The company further undertook to indemnify the insured while personally driving a private motor car not belonging to him and not hired to him under a hire-purchase agreement. The Schedule to the policy mentioning the limitations as to use, under the heading "Driver", mentioned "Any person . . . and the insured may also drive a motor car not belonging to him, etc., provided that the person driving holds a licence to drive the motor car or has held and is not disqualified from holding or obtaining such a licence."

Held, (1) The company under the Policy indemnified any person who was driving the motor car on the insured's order or with his permission and since P was driving the car with the permission of A who had effected the insurance, the company did undertake to indemnify P ;

(2) Once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act would not be affected by any condition in the policy.

Appeals by Special Leave from the Judgment and Decree dated 8th April, 1963, of the Bombay High Court in Appeals Nos. 10 and 11 of 1962.

S. T. Desai, Senior Advocate (V. N. Thakar, Advocate and J. B. Dadachanji, O. C. Mathur and Ravindar Narain, Advocates of M/s. J. B. Dadachanji & Co., with him), for Appellant (In both the Appeals).

G. S. Pathak, Senior Advocate, (O. P. Malhotra and I. N. Shroff, Advocates, with him), for Respondent No. 1. (In both the Appeals).

V. J. Merchant, Advocate of *M/s. Gagrāt & Co.*, for Respondents Nos. 2 and 4 to 7 (In C.A. No. 1043 of 1963).

The Judgment of the Court was delivered by

Raghubar Dayal, J.—These appeals by Special Leave arise in the following circumstances :

S. N. Asnani owned Chevrolet Car bearing registered No. AA 4431. He insured it with the New Asiatic Insurance Co., Ltd. hereinafter referred to as the company, under a policy dated 26th November, 1957. Asnani permitted Pessumal Dhanamal Aswani, hereinafter called Pessumal, to drive that car. When Pessumal was driving the car with Daooji Radhamohan Meherotta and Murli Dholandas in the car, the car met with an accident as a result of which Meherotta died and Murli received injuries.

Pessumal himself owned a Pontiac car which had been insured with the Indian Trade and General Insurance Co., Ltd., under Policy No. Bombay P. C. 42733-2 dated 18st November, 1957.

The heirs of Meherotta instituted Suit No. 70 of 1959 against Pessumal for the recovery of Rs. 2,50,000 by way of damages with interest. Murli instituted Suit No. 71 of 1959 against Pessumal to recover Rs. 1,50,000 by way of damages.

Notices under section 96 (2) of the Motor Vehicles Act, 1939 (IV of 1939), hereinafter called the Act were issued to the New Asiatic Insurance Co., Ltd. The notice was given to the company as the defendant's liability to third parties had been insured with it under its policy No. MV/4564. The company then took out Chamber Summons and it was contended, that notice under section 96 (2) of the Act was bad in law and should be set aside and that the company was not liable to satisfy any judgment which might be passed in the suit against the defendant. Alternatively, it was prayed that the company be added as a party defendant to the suit or be authorised to defend the suit in the name of the defendant. Tarkunde, J., held the notice issued to the company in the suits, under section 96 (2) of the Act, to be bad in law, and accordingly, set them aside.

The plaintiffs then filed Letters Patent Appeals which were allowed and the Chamber Summonses were dismissed. It was directed that the trial Judge would hear the alternative prayers in the Chamber Summonses and make the necessary orders. It is against this order in each of the appeals that the company has preferred these appeals, after obtaining Special Leave.

To appreciate the contentions of the parties in these appeals, reference may be made to certain provisions in the two policies. The various provisions in the two policies are identical in matters affecting the question for determination before us. We therefore set out the relevant provisions from the policy issued by the company and would refer to differences, if any, at the proper place.

The policy is described as 'Private Car (Comprehensive Policy)'. The policy issued by the other company does not so describe it, but it is also a Comprehensive Policy as the premium charged is on that basis. The policy insures, under section I against loss or damage, under section II against liability to third parties and under section III against liability for medical expenses. Thereafter follow the general exceptions and conditions.

Paragraph 1 of section II indemnifies the insured, i.e., Asnani who effected the policy, in the event of accident caused by or arising out of the use of the motor car, against all sums which he may become legally liable to pay in respect of death or of bodily injury to any person. Paragraphs 3 and 4, generally known as 'Other drivers Extension Clause' and 'Other Vehicles Extension Clause' respectively, are material and are set out in full :

"3. In terms of and subject to the limitations of the indemnity which is granted by this section to the Insured the Company will indemnify any driver who is driving the Motor Car on the Insured's order or with his permission provided that such Driver :—

(a) is not entitled to indemnity under any other policy.

(b) shall as though he were the Insured observe fulfil and be subject to the terms exceptions and conditions of the policy in so far as they can apply.

4. In terms of and subject to the limitations of the indemnity which is granted by this section in connection with the Motor Car the Company will indemnify the Insured whilst personally driving a private Motor Car (but not a Motor Cycle) not belonging to him and not hired to him under a Hire-Purchase Agreement."

Under the heading 'Avoidance of certain terms and right of recovery', the policy states :

"Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, section 96.

But the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions."

Condition 6 reads :

"6. If at the time any claim arises under this Policy there is any other existing insurance covering the same loss damage or liability the Company shall not be liable to pay or contribute more than its rateable proportion of any loss damage compensation costs or expense. Provided always that nothing in this condition shall impose on the Company any liability from which but for this Condition it would have been relieved under proviso (a) of section II-3 of this policy."

The Schedule to the policy mentions the limitations as to use and under the heading 'Driver' notes :

"(a) Any person.—

(b) The insured may also drive a motor car not belonging to him and not hired to him under a Hire Purchase Agreement :

Provided that the person driving holds a licence to drive the motor car or has held and is not disqualified for holding or obtaining such a licence."

At the end of the Schedule is an important notice which reads :

"The insured is not indemnified if the vehicle is used or driven otherwise than in accordance with this Schedule. Any payment made by the Company by reason of wider terms appearing in the Certificate in order to comply with the Motor Vehicles Act, 1939, is recoverable from the Insured. See the clause headed 'Avoidance of certain terms and right of recovery'."

The contention for the appellant is that in view of paragraph 4 of Pessumal's policy issued by the other company, Pessumal was indemnified against any liability incurred by him whilst personally driving a private motor-car not belonging to him and not hired to him under a Hire-Purchase Agreement, and that therefore he was not included among the persons indemnified in paragraph 3 of the policy it had issued to Asnani on account of proviso (a) to paragraph 3 which reads :

"Provided that such driver is not entitled to indemnity under any other policy."

This contention is met by the respondent on the ground that this proviso is not a limitation on the class of persons indemnified under paragraph 3, that class being the drivers driving the Chevrolet car insured under the policy, but merely amounted to a condition affecting the liability of the company *vis a vis* the driver who was entitled to indemnity under any other policy. The question thus reduces itself to the determination of whether Pessumal comes within the persons indemnified in paragraph 3 of the policy issued by the company.

We may now set out the relevant provisions of the Act which have a bearing on the contention between the parties. Chapter VIII of the Act provides for insurance of motor vehicles against third party risks. Section 93 defines the expressions 'authorised insurer', 'certificate of insurance' and 'reciprocating country'. The relevant portions of the various sections are :

"94. (1) No person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of this Chapter.

Explanation.—A person driving a motor vehicle merely as a paid employee, while there is in force in relation to the use of the vehicle no such policy as is required by this sub-section, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force.

(2) Sub-section (1) shall not apply to any vehicle owned by the Central Government or a State Government and used for Government purposes unconnected with any commercial enterprise.

(3) The appropriate Government may, by order, exempt from the operation of sub-section (1) any vehicle owned by any of the following authorities namely :—

* * * * *

Provided that no such order shall be made in relation to any such authority unless a fund has been established and is maintained by that authority in accordance with the rules made in that behalf under this Act for meeting any liability arising out of the use of any vehicle of that authority which that authority or any person in its employment may incur to third parties.

* * * * *

95. (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—

(a) is issued by a person who is an authorised insurer or by a co-operative society allowed under section 108 to transact the business of an insurer, and

(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in a public place :

* * * * *

(4) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any conditions subject to which the policy is issued and of any other prescribed matters ; and different forms, particulars and matters may be prescribed in different cases.

* * * * *

(5) Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

96. (1) If, after a certificate of insurance has been issued under sub-section (4) of section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal ; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely :—

* * * * *

(3) Where a certificate of insurance has been issued under sub-section (4) of section 95 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any conditions other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of section 95, be of no effect :

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(4) If the amount which, an insurer becomes liable under this section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

* * * * *

(6) No insurer to whom the notice referred to in sub-section (2) or sub-section (2-A) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in sub-section (1) or sub-section (2-A) otherwise than in the manner provided for in sub-section (2), or in the corresponding law of the State of Jammu and Kashmir or of the reciprocating country, as the case may be."

Chapter VIII of the Act, it appears from the heading, makes provision for insurance of the vehicles against third party risks, that is to say, its provisions ensure

that third parties who suffer on account of the user of the motor vehicle would be able to get damages for injuries suffered and that their ability to get the damages will not be dependent on the financial condition of the driver of the vehicle whose user led to the causing of the injuries. The provisions have to be construed in such a manner as to ensure this object of the enactment.

Section 94 prohibits, as a matter of necessity, for insurance against third party risk, the use of a motor vehicle by any person unless there exists a policy of insurance in relation to the use of the vehicle by that particular person and the policy of insurance complies with the requirements of Chapter VIII. The policy must therefore provide insurance against any liability to third party incurred by that person when using that vehicle. The policy should therefore be with respect to that particular vehicle. It may, however, mention the person specifically or generally by specifying the class to which that person may belong, as it may not be possible to name specifically all the persons who may have to use the vehicle with the permission of the person owning the vehicle and effecting the policy of insurance. The policy of insurance contemplated by section 94 therefore must be a policy by which a particular car is insured.

Section 95 lays down the requirements which are to be complied with by the policy of insurance issued in relation to the use of a particular vehicle. They are : (1) the policy must specify the person or classes of persons who are insured with respect to their liability to third parties ; (2) the policy must specify the extent of liability which must extend to the extent specified in sub-sections (2) and (3) the liability which would be incurred by the specified person or classes of persons in respect of death or bodily injury to any person caused by or arising out of the use of the vehicle insured in a public place.

Sub-section (4) of section 95 requires the issue of a certificate of insurance, in the prescribed form, to the person who effects the policy. The form of the certificate prescribed by the Motor Vehicles Third Party Insurance Rules, 1946, requires the specification of persons or classes of persons entitled to drive. The authorised insurer is also to certify in the certificate that the policy to which the certificate relates, as well as the certificate of insurance, are issued in accordance with the provisions of Chapter VIII of the Act.

Sub-section (5) of section 95 makes the insurer liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons. If the policy covers the insured for his liability to third parties, the insurer is bound to indemnify the person or classes of persons specified in the policy. The same is the effect of sub-section (1) of section 96 which provides that the insurer is bound to pay to the person entitled to the benefit of a decree he obtains in respect of any liability covered by the terms of the policy against any person insured by the policy irrespective of the fact whether the insurer was entitled to avoid or cancel or might have avoided or cancelled the policy. This means that once the insurer has issued a certificate of insurance in accordance with sub-section (4) of section 95 he has to satisfy any decree which a person receiving injuries from the use of the vehicle insured obtains against any person insured by the policy. He is however liable to satisfy the decree only when he has been served with a notice under sub-section (2) of section 96 about the proceedings in which the judgment was delivered. It is for this reason that a notice under sub-section (2) of section 96 was issued to the company and it is on account of the consequential liability in case the plaintiffs' claim is decreed against Pesumal that the appellant challenged the correctness of the allegation that Pesumal was a person insured under the policy issued by it in respect of the Chevrolet car. It follows from a consideration of these various provisions of the Act—and this is not really disputed for the appellant—that if under the terms of the policy Pesumal can be said to be the person insured under paragraph 3, the company would be liable to satisfy the decree if any passed against Pesumal.

The whole question then is whether Pesumal comes within the terms of paragraph 3 of section II of the policy.

Under this paragraph, the company indemnifies any person who is driving the motor-car on the insured's order or with his permission. Pesumal was driving the car with the permission of Aswani who had effected the policy and therefore the company undertook to indemnify Pesumal in accordance with this provision of paragraph 3. The appellant, however, contends that this provision should not be read as defining by itself the class of persons insured under it, in view of the further classification of this class of drivers by proviso (a). It is contended that only such drivers were indemnified as were not entitled to indemnity under any other policy and thus drivers who were entitled to indemnity under any other policy were taken out of the general class of drivers driving the car on the insured's order or with his permission. We do not agree with this contention.

The proviso is not really a classification of drivers but is a restriction on the right of the driver to recover any damages he had to pay, from the company. The driver who can get indemnity from any other company under any other policy is, under this contractual term, not to get indemnity from the company. The proviso thus affects the question of indemnity between a particular driver and the company and has nothing to do with the liability which the driver has incurred to the third party for the injuries caused to it and against which liability was provided by section 94 of the Act and was effected by the policy issued by the company. The company, by agreeing with the person who effects the policy, to insure him against liability to third parties, takes upon itself the entire liability of the person effecting the insurance. It is open to the insurer not to extend this indemnity to the insured to other persons but if it extends it to other persons, it cannot restrict it *vis-a-vis* the right of the third party entitled to damages, to recover them from the insured, a right which is not disputed. A proviso meant to exempt certain persons from the general classification will have to be related to considerations affecting it and is not to be related to such classified persons' right to indemnity from any other insurer. In this connection reference may be made to proviso (b) which cannot in any case be a proviso relating to the classification of persons to be indemnified. It provides that the person indemnified under paragraph 3 will observe, fulfil and be subject to the terms, exceptions and conditions of the policy in so far as they can apply to him.

We are further of opinion that clause (4) of section II of Pesumal's policy with the other company does not make that policy to be a policy within the meaning of section 94 of the Act in relation to the Chevrolet car by whose user Pesumal, incurred liabilities sought to be established in the two suits. The paragraph indemnifies the insured, *i.e.*, Pesumal, whilst personally driving any private motor car. It does not indemnify him against the liability incurred when driving any particular car and therefore, in view of what we have said earlier, Pesumal's policy cannot be a policy of insurance in relation to the Chevrolet car as required by section 94 of the Act. Such a policy and any indemnity under it cannot be used for sub-classifying drivers specified in the policy of the company.

The Act contemplates the possibility of the policy of insurance undertaking liability to third parties providing such a contract between the insurer and the insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect to its realising damages for the injuries suffered, but *vis-a-vis* the insured, the company does not undertake that liability or undertakes it to a limited extent. It is in view of such a possibility that various conditions are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the company to third parties. This is mentioned prominently in the policy itself and is mentioned under the heading 'Avoidance of certain terms and rights of recovery', as well as in the form of 'an important notice' in the Schedule to policy. The avoidance clause says that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the

provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The 'Important Notice' mentions that any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Act is recoverable from the insured, and refers to the avoidance clause.

Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake *vis-a-vis* the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of paragraph 3 of section II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim against the company on account of its claim against a person specified in paragraph 3 as one to whom cover of the policy was extended.

It has been contended for the appellant that it was not incumbent on the owner of a car to take out a policy of insurance indemnifying himself or any person permitted to drive the car and that if he does not insure the car and uses it he runs the risk of prosecution under section 125 of the Act. This is true, but has no relevant effect on the question for decision before us. Asnani did insure his car with respect to liability against third persons. We have to see whether the company, on account of undertaking that liability can be said to have insured Pesumal on account of his driving the car with the permission of Asnani. The same may be said about the other contention for the appellant that there is nothing in the Act which makes it compulsory for an insurer to insist that the owner of the car takes out a policy in the widest terms possible covering any person who drives the car with his permission. The company did agree under the policy to indemnify drivers who drove the car with the insured's permission. The question is whether that undertaking covers Pesumal.

Lastly, we may mention that the question about the proper stage at which the question raised by the company in the Chamber Notice is to be decided, came up for consideration at the hearing. We however do not propose to express any opinion on that point in this case.

We are of the opinion that High Court rightly held that the company had insured Pesumal in view of paragraph 3 of section II of the policy and that it comes within the expression 'insurer' in section 96 of the Act. We therefore dismiss the appeals with costs of hearing, one set.

P. R. N.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

PRESENT :—K. SUBBA RAO, J. C. SHAH AND S. M. SIKRI, JJ.

Bharat Fire and General Insurance, Ltd., New Delhi

.. *Appellant**

Commissioner of Income-tax, New Delhi

.. *Respondent.*

Income-tax Act (XI of 1922), section 2 (6-A)—Dividend—Share premiums—Credited to company's capital reserve—Distribution as dividends before 1st April, 1956—Dividend, whether out of profits—Whether taxable as dividend in shareholder's hands—Companies Act (VII of 1913)—Table A—Regulation 97—Companies Act (I of 1956), section 78.

A company issued shares at a premium in 1945. The share premiums received by the company were held in a separate reserve called "capital reserve". In the year 1953, the company declared a

dividend out of this capital reserve. The assessee, a shareholder of the company, received Rs. 50,787 under the said declaration. The amount was charged to income-tax in the shareholder's hands as "dividend" for the assessment year 1954-55. The assessment was sustained by the Appellate Tribunal, whose decision was upheld by the High Court on Reference. On appeal, by Special Leave, the assessee contended that the amount was not dividend since it was not distributable out of profits within the meaning of Regulation 97 of Table A of the Indian Companies Act, 1913, that it was a distribution out of the capital gains of the company and hence exempt and that the share premium amounts in the capital reserve of the company could not, under section 78 of the Companies Act, 1956, be distributed as dividends.

Held, that before the commencement of the Companies Act, 1956, premiums received on the issue of shares were profits available for distribution. The same connotation should be attached to the word 'profits' in Regulation 97 of Table A of the Indian Companies Act, 1913.

Section 78 of the Companies Act, 1956 does not in any way change the taxability of a dividend declared out of premiums on shares received by a company before the said Act came into force. The company has already dealt with the premium in such a way that they had ceased to remain as an identifiable part of the company's reserves. Hence the premiums are to be disregarded under section 78 (3) of the Companies Act for the creation of the share premium account. If this is so the premiums which have already been distributed cannot be invested with the character of capital in the hands of the distributing company.

Appeal by Special Leave from the Judgment dated 12th December, 1960 of the Punjab High Court in Income-tax Reference No. 2 of 1958.

S. K. Kapur, Senior Advocate (*K. K. Jain*, *Bishambar Lal Khanna* and *S. Murthy*, Advocates, with him), for Appellant.

C. K. Daphtry, Attorney-General for India (*R. Ganapathy Iyer* and *R. N. Sachithy*, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

Sikri, J.—The appellant is a joint-stock company, hereinafter referred to as the assessee, having its registered office in Delhi. It held 11,950 'B' Preference shares in another company, called Rohtas Industries, Ltd., in the previous year (calendar year ending December 31, 1953). The latter company paid a sum of Rs. 50,787 as dividend on the said preference shares to the assessee, and for the assessment year 1954-55 this sum was taxed in the hands of the assessee as dividend, within section 2 (6-A) of the *Indian Income-tax Act, 1922*, by the Income-tax Officer. The Appellate Assistant Commissioner, on appeal by the assessee, held it not to be taxable. The Income-tax Appellate Tribunal, on an appeal by the Department, however, agreed with the Income-tax Officer, and allowed the appeal. On the application of the assessee, the Appellate Tribunal stated a case for the opinion of the Punjab High Court. The High Court upheld the contention of the Department and answered the question referred to it against the assessee. The assessee, after failing to get a certificate under section 66-A (2) of the *Income-tax Act*, obtained Special Leave from this Court, and now the appeal is before us for disposal.

The question referred to the High Court is as follows :

"Whether, on the facts and in the circumstances of the case, the receipt of Rs. 50,787 was a receipt of dividend, and is taxable under the *Indian Income-tax Act*."

The facts and circumstances referred to in the question are as follows. Rohtas Industries, Ltd., hereinafter referred to as the declaring company, had in the year 1945 issued shares at a premium, and the share premiums so received by it were kept separate under the head "capital reserve". The declaring company declared a dividend in the previous year of the assessee out of the above capital reserve.

The learned Counsel for the assessee contends before us that the sum received by the assessee is not dividend within the definition of the word in section 2 (6-A) of the *Income-tax Act*. He says that the share premiums were not profits capable of being distributed as profits within Regulation 97 of Table A of *Companies Act of 1913* which lays down that

"no dividend shall be paid otherwise than out of the profits of the year or any other undistributed profits."

He argues further that it was a capital gain in the hands of the declaring company and capital gains are expressly excluded from the definition of 'dividend' by the *Explanation* to section 2 (6-A) which provides that

"the expression 'accumulated profits' wherever it occurs in this clause shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948."

Lastly, he urges that in any event, section 78 of the Companies Act, 1956, has placed this sum beyond the reach of the Revenue.

Before advertng to the arguments addressed to us, it is necessary to reproduce the relevant statutory provisions. Section 2 (6-A) of the Income-tax Act defines 'dividend' as follows :

"(6-A) 'dividend' includes—

(a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company ;

(b)

(c)

Provided that

(d)

Provided that.....

Provided further that the expression 'accumulated profits', wherever it occurs in this clause, shall not include capital gains arising before the 1st day of April, 1946, or after the 31st day of March, 1948."

Section 78 of the Companies Act, 1956, reads :—

"78. (1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called 'the share premium account' ; and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid-up share capital of the company.

(2) The share premium account may, notwithstanding anything in sub-section (1), be applied by the company—

(a) in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares ;

(b) in writing off the preliminary expenses of the company ;

(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company ; or

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company.

(3) Where a company has, before the commencement of this Act, issued any shares at a premium, this section shall apply as if the shares had been issued after the commencement of this Act :

Provided that any part of the premiums which has been so applied that it does not at the commencement of this Act form an identifiable part of the company's reserves within the meaning of Schedule VI, shall be disregarded in determining the sum to be included in the share premium account."

It is evident from the definition of the word 'dividend' that if a distribution of accumulated profits, whether capitalised or not, entails the release by the company to its shareholder of all or any part of its assets, it is dividend. It is not disputed that the distribution of Rs. 50,787 entails the release of the assets of the declaring company. But it is contended that there was no distribution of accumulated profits, because by virtue of Regulation 97, Table A of the Companies Act, 1913, no dividend could be paid otherwise than out of the profits of the year or any other undistributed profits. It is said that the premiums received by the declaring company were not profits within Regulation 97.

We are unable to accede to this contention. Previous to the enactment of section 78 of the Companies Act of 1956, and the corresponding section in the English Companies Act, it was recognised that a company could distribute premiums received on the issue of shares as dividends (*vide* Palmer's Company Law, Twentieth Edition). At page 637, it is stated :

"It is evident from the preceding observations that it is legally permissible for the company to distribute dividend out of assets which do not represent profits made as the result of its trading or business. The connotation of divisible profits, or profits in the legal sense, is much wider than

that of profits in the business sense ; the former term includes, e.g., reserves accumulated from past profits, from realised capital profits indeed, before the requirement of a share premium account by the 1947-48 legislation, from premiums obtained on issue of new shares, whereas none of these items is regarded and rightly so, by the businessman or accountant as trading profits."

Palmer relies on two cases : *Re Hoares & Co., Ltd.*¹ and *Drown v. Gaumont-British Picture Corporation*². In *Re Hoares Case*¹, the company had created a reserve fund consisting partly of premiums received on the issue of preference shares. It having incurred a loss arising from the depreciation in the value of the public houses below the amount stated in the company's balance sheet, applied for sanction of the Court to a scheme for reduction of capital whereby the company, while retaining a small portion of the reserve, attributed to the reserve, more than its rateable proportion and to capital account less than that of its rateable proportion. Buckley, J., apparently held that these premiums were not 'profits' in the strict sense ; and, on appeal, the Counsel for the company contended before the Court of Appeal that this was wrong. Romer, L.J., disposed of this contention in the following words :

"The surplus which was carried to the reserve fund represented that which might have been properly applied at the time, if the company had so thought fit, in paying further dividends to shareholders and no person could have complained if they had done so."

Thus, Romer, L.J., thought that there was nothing objectionable in utilising premiums received on the issue of shares for the purpose of declaring dividend.

In *Drown's Case*², a company proposed to pay a dividend on its preference shares and utilise, in part, premiums received by the company on the issue of shares, which had in fact been invested in the assets of the company. The plaintiff asked for an injunction to restrain the company from paying the dividend. Clauson, J., held that part of a reserve fund consisting of moneys paid by way of premiums on shares, unless set aside in some particular fund which has been wholly spent, is available for dividend purposes. We are not concerned with other points that arose in the case and we have only set out the facts and findings relevant to the question before us. We may here set out Article 129 of the *Gaumont-British Picture Corporation, Ltd.* Article 129 reads thus :

"The Directors may, with the sanction of a general meeting, from time to time declare dividends or bonuses, but no such dividend shall (except as by the statutes expressly authorised) be payable otherwise than out of the profits of the company....."

Mr. Kapur, learned Counsel for the appellant, had contended that the English law was different inasmuch as what was prohibited in English law was payment of dividends out of capital and that it did not enjoin directors to pay dividends out of profits. This case refutes Mr. Kapur's contention. In *Re Duff's Settlements, National Provincial Bank, Ltd. v. Gregson*³, which is strongly relied on on behalf of the appellant, and which we will advert to in detail later, Jenkins, L.J., says at page 926:

"The share premiums would have been profits available for (distribution see *Drown v. Gaumont-British Picture Corporation*"²).

It was thus well-established before the Act of 1956 and the corresponding English Act that premiums received on the issues of shares were profits available for distribution. We are of the opinion that the same connotation should be attached to the word 'profits' in Regulation 97 of Table A. In this view of the matter, it is not necessary to pronounce on the question whether even if these premiums were not profits within Regulation 97, this would necessarily exclude them from coming within the words 'accumulated profits' within section 2 (6-A) (a).

This takes us to the next point raised before us : Are the premiums received on the issue of shares capital gains within the *Explanation* to section 2 (6-A)? This point was not urged before the High Court or the Appellate Tribunal and we did not allow it to be developed.

The last point may now be dealt with. In this connection, it is necessary to appreciate the scheme of section 78 of the Companies Act, 1956. Sub-section (1)

1. L.R. (1904) 2 Ch. 208 : 73 L.J. Ch. 601 : 91 609 : 106 L.J. Ch. 241 : 157 L.T. 543.
L.T. 115.
2. L.R. (1937) Ch. 402 : (1937) 2 All E.R. 534 : (1951) 2 T.L.R. 474.
3. L.R. (1951) 1 Ch. 923 : (1951) 2 All E.R.

enjoins a company, when it issues shares at a premium, to transfer the premiums to an account called 'the share premium account', and it then applies the provisions of the Act relating to the reduction of the share capital of a company as if the share premium account were paid-up capital of the company. Sub-section (2) then provides how the share premium account may be applied. It is said that it impliedly provides that it cannot be used for the purpose of paying dividends. Sub-section (3) then deals with the issue of shares at a premium before the commencement of this Act. It deems them to have been issued after the commencement of the Act and applies the provisions of section 78. The effect of this would be that a company which had issued shares at a premium before the commencement of this Act would by virtue of section 78 have to open a share premium account and transfer to it the premium so received. What is to happen if, before the commencement of the Act, the company has already dealt with the premium in such a way that they had ceased to remain as an identifiable part of the company's reserves? The sub-section says that in that event the premiums so dealt with shall be disregarded in determining the sum to be included in the share premium account. If such premiums are to be disregarded for the creation of the share premium account, it means that they fall outside the purview of section 78. It has no application to them. If this is so, it is difficult to appreciate how the appellant can utilise this section for the purpose of showing that the premiums which have already been distributed become invested with the character of capital in the hands of the distributing company. We do not say that for the purpose of income-tax any future application of the share premium account in one of the ways mentioned in sub-section (2) will be treated as distribution of capital. No such question arises for our determination in this case. But we do hold that section 78 of the Companies Act does not in any way change the taxability of dividends declared out of premiums on shares received by a company before the Act of 1956 came into force. If it was taxable, apart from section 78, it remains so taxable.

The case of *Duff's Settlements*¹, referred to above, on which the learned Counsel strongly relied, might or might not help him if the declaration of dividend had taken place after the Act of 1956. We are of the opinion that what was decided in this case has no relevance to the facts of this appeal.

Before concluding, we may refer to the decision of the House of Lords in *Inland Revenue Commissioners v. Reids Trustees*², relied on by the learned Counsel for the respondents. This case would be relevant if we were considering generally whether the receipt of Rs. 50,787 was income or capital in the hands of the assessee. The question, however, referred to the High Court is limited, and that is whether the receipt of Rs. 50,787 was a receipt of dividend and taxable. It is, therefore, unnecessary to say more about this case.

In the result, we agree with the High Court that the answer to the question referred to it is in the affirmative. The appeal fails and is dismissed with costs.

V.S.

Appeal dismissed.

1. L.R. (1951) 1 Ch. 923 : (1951) 2 All E.R. 534 : (1951) 2 T.L.R. 474.

2. (1949) 1 All E.R. 354 : 30 T.C. 431 : L.R. 1949 A.C. 361.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT:—B. P. SINHA, *Chief Justice*, M. Hidayatullah AND K. C. DAS GUPTA, JJ.

Jamuna Singh and others

... Appellants*

v.

Bhadai Shah

... Respondent.

Criminal Procedure Code (V of 1898), section 417 (3)—Appeal against acquittal—Right of complainant to prefer—Magistrate after examining complainant ordering 'To Sub-Inspector, Baikunthpur, for instituting a case and report'—If case taken cognizance of on the complaint or on police report.

Section 417 (3) introduced in the Criminal Procedure Code by the Amending Act XXVI of 1955 gives a right of appeal to the complainant against acquittal where a case is instituted upon a complainant. When a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, a case is instituted in the Magistrate's Court and such a case is instituted on a complaint. Where after examining the complainant the Magistrate made an order "To Sub-Inspector, Baikunthpur for instituting a case and report by 12th December, 1956" the order would be one under section 202, Criminal Procedure Code. The report made by the Police Officer though purporting to be made under section 173 of the Criminal Procedure Code, should be treated in law to be a report only under section 202 of the Criminal Procedure Code. Cognizance having already been taken by the Magistrate there was no scope of cognizance being taken afresh of the same offence after the Police Officers report was received. As the case was instituted on complaint and not on Police report the complainant has a right to appeal against the acquittal under section 417 (3) of the Criminal Procedure Code. At best in so far as the Magistrate asked the Police to institute a case he acted irregularly but such irregularity had not resulted in any failure of justice.

Appeal by Special Leave from the Judgment and Order dated 27th November, 1959 of the Patna High Court in Criminal Appeal No. 63 of 1957.

D. P. Singh, Advocate, of M/s. Ramamurthi & Co., Advocates, for Appellants;

K. K. Sinha, Advocate, for Respondent.

The Judgment of the Court was delivered by

Das Gupta, J.—These seven appellants were tried by the Assistant Sessions Judge, Saran, on charges under section 395 of the Indian Penal Code and also under section 323 of the Indian Penal Code but acquitted by him of both the charges.

The prosecution case was that on 15th November, 1956 when Bhadai Shah a businessman, belonging to Teotith, within police station, Baikunthpur, was passing along the village road on his way to purchase *patua* the seven appellants armed with lathis surrounded him and demanded that he should hand over the moneys he had with him. Bhadai had Rs. 250 with him but he refused to part with them. Kesho Singh, one of the appellants, tried to take away forcibly the currency notes from his pocket but Bhadai caught hold of his arm and raised an alarm. On this all the appellants assaulted him with their lathis and as he fell injured Kesho Singh took away the money from his pocket. Bhadai thereupon filed a petition of complaint in the Court of the Sub-Divisional Magistrate, Gopalganj, on 22nd November, 1956. The Magistrate after examining him on solemn affirmation made an order asking the Sub-Inspector of Police, Baikunthpur, to institute a case and report by 12th December, 1956. Ultimately a charge-sheet was submitted by the police and the accused persons were committed to the Court of Sessions. The Sessions trial ended, as already stated, in the acquittal of all the appellants.

Against the order of acquittal, Bhadai Shah filed an appeal under section 417 (3) of the Code of Criminal Procedure in the High Court of Judicature at Patna. On the following day two learned Judges of the High Court made the order: "The appeal will be heard." The appeal then came up for hearing before two other

learned Judges of the Court who being of opinion that the learned Sessions Judge had rejected the prosecution evidence "on unsound standards without any real effort to assess the credibility of the evidence" and that the prosecution case was fully established by the evidence, set aside the order of acquittal and convicted the appellants under section 395 of the Indian Penal Code and sentenced them to two years' rigorous imprisonment.

Against this order of the High Court the present appeal has been filed by Special Leave of this Court.

The main contention urged in support of the appeal is that in this case no appeal lay to the High Court against an order of acquittal, under section 417 (3) of the Code of Criminal Procedure. This provision in section 417 was introduced in the Code by the Amending Act XXVI of 1955, giving a complainant a right of appeal against acquittal where a case is instituted upon a complaint. Before this new legislation only the State Government had the right to appeal against an order of acquittal. The result of the new provision in sub-section (3) is that if an order of acquittal is passed by any Court other than a High Court in a case instituted upon a complaint the High Court on an application made to it by the complainant in this behalf may grant Special Leave to appeal from the order of acquittal and on such leave being granted the complainant may present such an appeal to the High Court. It is to be noticed that this right is limited only to cases instituted upon a complaint. On behalf of the appellants it is argued that the case against them was not instituted on any complaint but was instituted on a police report.

The Code does not contain any definition of the words "institution of a case." It is clear however and indeed not disputed, that a case can be said to be instituted in a Court only when the Court takes cognizance of the offence alleged therein. Section 190 (1) of the Code of Criminal Procedure contains the provision for cognizance of offences by Magistrates. It provides for three ways in which such cognizance can be taken. The first is on receiving a complaint of facts which constitute such offence; the second is on a report in writing of such facts—that is, facts constituting the offence—made by any police officer; the third is upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed. Section 193 provides for cognizance of offences being taken by Courts of Sessions on commitment to it by a Magistrate duly empowered in that behalf. Section 194 provides for cognizance being taken by High Court of offences upon a commitment made to it in the manner provided in the Code.

An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such facts made by any police officer it is a case instituted in the Magistrate's Court on a police report.

To decide whether the case in which the appellants were first acquitted and thereafter convicted was instituted on a complaint or not, it is necessary to find out whether the Sub-Divisional Magistrate, Gopalganj, in whose Court the case was instituted, took cognizance of the offences in question on the complaint of Bhadaï Shah filed in his Court on 22nd November, 1956, or on the report of the Sub-Inspector of Police dated 13th December, 1956. It is well settled now that when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offences mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation under section 156 (3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence. It was so

held by this Court in *R. R. Chari v. State of U.P.*¹ and again in *Gopal Dass v. State of Assam*².

In the case before us the Magistrate after receipt of Bhadi Shah's complaint proceeded to examine him under section 200 of the Code of Criminal Procedure. That section itself states that the Magistrate taking cognizance of an offence on a complaint shall at once examine the complainant and the witnesses present, if any, upon oath. This examination by the Magistrate under section 200 of the Code of Criminal Procedure puts it beyond doubt that the Magistrate did take cognizance of the offences mentioned in the complaint. After completing such examination and recording the substance of it in writing as required by section 200 the Magistrate could have issued process at once under section 204 of the Code of Criminal Procedure or could have dismissed the complaint under section 203 of the Code of Criminal Procedure. It was also open to him, before taking either of these courses, to take action under section 202 of the Code of Criminal Procedure. That section empowers the Magistrate to :

"postpone the issue of process for compelling the attendance of persons complained against and either enquire into the case himself or if he is a Magistrate other than a Magistrate of the third class, direct an enquiry or investigation to be made by any Magistrate subordinate to him, or by a police officer, or by such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint."

If and when such investigation or inquiry is ordered the result of the investigation or inquiry has to be taken into consideration before the Magistrate takes any action under section 203 of the Code of Criminal Procedure.

We find that in the case before us the Magistrate after completing the examination under section 200 of the Code of Criminal Procedure and recording the substance of it made the order in these words :—

"Examined the complaint on s.a. The offence is cognizable one. To Sub-Inspector, Baikunthpur for instituting a case and report by 12th December, 1956."

If the learned Magistrate had used the words "for investigation" instead of the words "for instituting a case" the order would clearly be under section 202 of the Code of Criminal Procedure. We do not think that the fact that he used the words "for instituting a case" makes any difference. It has to be noticed that the Magistrate was not bound to take cognizance of the offences on receipt of the complaint. He could have, without taking cognizance, directed an investigation of the case by the police under section 156 (3) of the Code of Criminal Procedure. Once however he took cognizance he could order investigation by the police only under section 202 of the Code of Criminal Procedure and not under section 156 (3) of the Code of Criminal Procedure. As it is clear here from the very fact that he took action under section 200 of the Code of Criminal Procedure, that he had taken cognizance of the offences mentioned in the complaint, it was open to him to order investigation only under section 202 of the Code of Criminal Procedure and not under section 156 (3) of the Code. It would be proper in these circumstances to hold that though the Magistrate used the words "for instituting a case" in his order of 22nd November, 1956, he was actually taking action under section 202 of the Code of Criminal Procedure, that being the only section under which he was in law entitled to act.

The fact that the Sub-Inspector of Police treated the copy of the petition of complaint as a first information report and submitted "charge-sheet" against the accused persons cannot make any difference. In the view we have taken of the order passed by the Magistrate on 22nd November, 1956, the report made by the police officer though purporting to be a report under section 173 of the Code of Criminal Procedure should be treated in law to be a report only under section 202 of the Code of Criminal Procedure.

1. (1951) S.C.J. 302 : (1951) 1 M.L.J. 617 : 338: (1951) 1 M.L.J. (S.C.) 217 : (1951) 1 An. (1951) S.C.R. 312.
2. (1961) 1 S.C.J. 573 : (1961) M.L.J. (Cr.) W.R. (S.C.) 217 : A.I.R. 1961 S.C. 986.

Relying on the provisions in section 190 of the Code that cognizance could be taken by the Magistrate on the report of the police officer the learned Counsel for the appellants argued that when the Magistrate made the order on 22nd November, 1956, his intention was that he would take cognizance only after receipt of the report of the police officer and that cognizance should be held to have been taken only after that report was actually received in the shape of a charge-sheet under section 173 of the Code, after 13th December, 1956. The insuperable difficulty in the way of this argument, however, is the fact that the Magistrate had already examined the complainant under section 200 of the Code of Criminal Procedure. That examination proceeded on the basis that he had taken cognizance and in the face of this action it is not possible to say that cognizance had not already been taken when he made the order "to Sub-Inspector, Baikunthpur, for instituting a case and report by 12th December, 1956."

Cognizance having already been taken by the Magistrate before he made the order there was no scope of cognizance being taken afresh of the same offence after the police officer's report was received. There is thus no escape from the conclusion that the case was instituted on Bhadai Shah's complaint on 22nd November, 1956, and not on the police report submitted later by the Police Sub-Inspector, Baikunthpur. The contention that the appeal did not lie under section 417 (3) of the Code of Criminal Procedure must therefore be rejected.

The next contention raised on behalf of the appellants is that the High Court was not justified in interfering with the order of acquittal passed by the learned Assistant Sessions Judge. The reasoning on which the learned Assistant Sessions Judge rejected the evidence of the prosecution witnesses and the reasons for which the learned Judges of the High Court were of opinion that there was no real effort by the learned Sessions Judge to assess the credibility of the evidence have been placed before us. It is quite clear that the High Court examined the matter fully and carefully and on a detailed consideration of the evidence came to the conclusion that that assessment of the evidence had resulted in a serious failure of justice. The principles laid down by this Court in a series of cases as regards interference with orders of acquittal have been correctly followed by the High Court. There is nothing, therefore, that would justify us in reassessing the evidence for ourselves. As relevant parts of the evidence were however placed before us, we think it proper to state that on a consideration of such evidence we are satisfied that the decision of the High Court is correct.

As a last resort the learned Counsel for the appellants argued that the Magistrate had acted without jurisdiction in asking the police to institute a case and so the proceedings subsequent to that order were all void. As we have already pointed out, the order of the Magistrate asking the police to institute a case and to send a report should properly and reasonably be read as one made under section 202 of the Code of Criminal Procedure. So, the argument that the learned Magistrate acted without jurisdiction cannot be accepted. At most it might be said that in so far as the learned Magistrate asked the police to institute a case he acted irregularly. There is absolutely no reason, however, to think that that irregularity has resulted in any failure of justice. The order of conviction and sentence passed by the High Court cannot be reversed or altered on account of that irregularity.

In the result, the appeal is dismissed.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, K. SUBBA RAO, K. N. WANCHOO, J. C. SHAH AND RAGHUBAR DAYAL, JJ.

Raj Kishore Tewari

... Appellant*

v.

Govindaram Bhansali

... Respondent.

West Bengal Premises Rent Control (Temporary Provisions) Act (XVII of 1950), section 13 (2)—Sub-tenant (monthly) becoming tenant of landlord on decree for ejectment being passed against the chief tenant—Date on which the tenancy vis-a-vis the landlord commenced.

Section 13 (2) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 only lays down that the sub-tenant would become the tenant of the landlord if the tenancy-in-chief is determined lawfully. The sub-tenant cannot be said to become a tenant of the landlord from the date on which the tenancy of the chief tenant against whom a decree for ejectment is passed is determined. The provisions of section 13 (2) lay down that the sub-tenant would be tenant on the terms and conditions on which the sub-lessee would have held under the chief tenant if the tenancy of the tenant had not been determined.

[In the instant case the terms and conditions of the tenancy were that that sub-lessee was to be a monthly tenant on the payment of a certain rent and that his tenancy was to commence from the first day of April, 1954. Therefore the tenancy was by the calendar month, and the notice of ejectment requiring delivery of possession on the expiry of the month of tenancy was valid.]

Appeal by Special Leave from the Judgment and Decree dated 9th January, 1962 of the Calcutta High Court in Appeal from the Original Decree No. 48 of 1961,

N. C. Chatterjee, Senior Advocate, (*R. K. Garg, S. C. Agarwal, M. K. Ramamurthi* and *D. P. Singh*, Advocates of *M/s. Ramamurthi & Co.*, with him), for Appellants.

M. C. Setalvad, Senior Advocate, (*B. P. Maheshwari*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Raghubar Dayal, J.—Raj Kishore Tewari, appellant in this appeal by Special Leave, was occupying certain premises as sub-tenant of Susil Chandra Banerjee, under a registered lease dated 10th April, 1954. His tenancy commenced from 1st April, 1954. The rent fixed was Rs. 220 per mensem. Subsequently it was reduced to Rs. 205 by an agreement, dated 9th June, 1954. The tenancy was monthly.

Susil Chandra Banerjee was the tenant of Govindaram Bhansali from 15th September, 1943, at monthly rental of Rs. 153 plus certain other charges. On 16th June, 1955, the landlord obtained a decree of ejectment against Susil Chandra Banerjee. In view of sub-section (2) of section 13 of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 (XVII of 1950) hereinafter called the Act, the appellant became the tenant of the landlord after the determination of the tenancy of Susil Chandra Banerjee.

On 19th March, 1957, the landlord-respondent gave a notice to the appellant asking him to deliver possession of the premises on the expiry of the last day of April, 1957, on the ground that he, being the statutory tenant, had not paid rents to him since 16th June, 1955, and, as such, was not entitled to any protection under the West Bengal Premises Tenancy Act, 1956 (XII of 1956). Subsequently, on 10th June, 1957, the respondent instituted the suit for ejectment of the appellant from the premises. The suit was resisted by the appellant on various grounds. His defence was however struck off due to certain default. Ultimately, the suit was decreed on 15th December, 1959. An appeal to the High Court was unsuccessful. The High Court refused to give leave to appeal to this Court. Thereafter the appellant obtained Special Leave from this Court and filed the appeal.

The only point urged for the appellant is that the notice of ejectment dated 19th March, 1957, was invalid in view of the fact that under the law the notice

must be to require the appellant to deliver possession on the expiry of the month of tenancy, that the tenancy was from the 16th of a month as the decree for ejectment against the tenant of the first degree was passed on 16th June, 1955 and that this notice required the delivery of possession on the expiry of the last day of April. We may say that this point was not raised in the written statement. It was however allowed to be raised in the appellate Court but was repelled.

The only point to determine in this appeal is the date from which the tenancy of the appellant *vis-a-vis* the respondent commenced. The relevant portion of sub-section (2) of section 13 of the Act is :

"(2) Where any premises or any part thereof have been or has been sublet by 'a tenant of the first degree' or by 'a tenant inferior to a tenant of the first degree' as defined in Explanation to sub-section (1) and the sub-lease is binding on the landlord of such last mentioned tenant if the tenancy of such tenant in either case is lawfully determined otherwise than by virtue of a decree in a suit obtained by the landlord by reason of any of the grounds specified in clause (h) of the Proviso to sub-section (1) of section 12 the sub-lessee shall be deemed to be a tenant in respect of such premises or part, as the case may be holding directly under the landlord of the tenant whose tenancy has been determined, on terms and conditions on which the sub-lessee would have held under the tenant if the tenancy of the latter had not been so determined."

There is nothing in these provisions which should persuade us to hold, as urged for the appellant, that the sub-tenant becomes a tenant of the landlord from the date on which the tenancy of the tenant against whom a decree for ejectment is passed is determined. The provisions only lay down that the sub-tenant would become the tenant of the landlord if the tenancy-in-chief is determined lawfully. On the other hand, this sub-section lays down that the sub-tenant would be tenant on the terms and conditions on which the sub-lessee would have held under the tenant if the tenancy of the tenant had not been determined. This means that the terms and conditions of the tenancy between the erstwhile sub-tenant and the landlord continue to be the same which were the terms and conditions of the sub-tenancy. Such terms and conditions of the tenancy in the case of the appellant were that he was to be a monthly tenant on the payment of a certain rent and that his tenancy was to commence from the first day of April, 1954. It is clear therefore that his tenancy was by the calendar month. It commenced on the first day of the month and expired on the last day of the month. This period of monthly tenancy was in no way affected by the provisions of sub-section (2) of section 13 whose effect was simply this that the sub-tenant instead of being sub-tenant who had been ejected, got a direct connection with the landlord and became his tenant-in-chief or, as the Act describes, tenant in the first degree. The statutory provision just brought about a change in the landlord of the sub-tenant. The proprietor-landlord took the place of the tenant-in-chief from whom the sub-tenant had secured the tenancy.

We are therefore of opinion that the High Court was right in rejecting the contention of the appellant with respect to the invalidity of the notice for ejectment dated 19th March, 1957. The result is that the appeal fails and is dismissed with costs.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT : — P. B. GAJENDRAGADKAR AND K. C. DAS GUPTA, JJ.

Manipur Administration

*Appellant**

v.

M. Nila Chandra Singh

Respondent.

Manipur Foodgrains Dealers Licensing Order (1958), clause 3 (2)—Construction.

A dealer who comes within the definition prescribed by clause 2 (a) of the Manipur Foodgrains Dealers Licensing Order, 1958, should be carrying on the business of purchase, sale or storage: and that

would exclude solitary or single cases of sale, purchase or storage. If a person carries on a business as described by clause 2 (a) and does it without obtaining a licence as required by clause 3 (1) he would be guilty under section 7 of the Essential Commodities Act. Clause 3 (2) of the Order raises a statutory presumption which is no doubt rebuttable. The presumption amounts to this and nothing more than that the stock found with a given individual of 100 or more maunds of the specified foodgrains had been stored by him for the purpose of sale. The prosecution would still have to show that the store of the foodgrains was made for the purpose of carrying on the business of sale of the said foodgrains. The element of business which is essential to attract the provisions of clause 3 (1) is thus not covered by the presumption raised under clause (2). That part of the case would still have to be proved by the prosecution by other independent evidence.

Appeal from the Judgment and Order dated 2nd December, 1961, of the Judicial Commissioner's Court at Manipur in Criminal Revision No. 20 of 1961.

B. K. Khanna and R. N. Sachthey, Advocates, for Appellant.

W. S. Barlingay, Senior Advocate (*A. G. Ratnaparkhi*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, J.—The short question of law which arises in this appeal relates to the construction of clause 3 (2) of the Manipur Foodgrains Dealers Licensing Order, 1958. This question arises in this way.

The respondent was charged with having committed an offence punishable under section 7 of the Essential Commodities Act, 1955, in that on 9th February, 1960, he was found storing 178 mds. of paddy in his godown without any licence in violation of clause 3 of the said Order. The case against the respondent was that on 9th February, 1960, his godown was searched and 178 mds. of paddy was found stored in it. This fact was not denied by the respondent though he pleaded that the paddy which was found in his godown was meant for the consumption of the members of his family who numbered fifteen. He also pleaded that out of the stock found in his godown 40 mds. of paddy belonged to Lalito Singh, his relation. The learned Sub-Divisional Magistrate, Bishanpur, who tried the case of the respondent did not believe his statement that the stock was meant for the consumption of the members of his family. He however, believed the evidence of Lalito Singh that 40 mds. out of the stock belonged to him, and so he passed an order directing that out of the stock which had been attached 40 mds. should be released in favour of Lalito Singh. In regard to the rest of the stock, the learned trial Magistrate came to the conclusion that as a result of the provisions contained in clause 3 (2) of the Order a presumption arose against the respondent and that presumption took his case under clause 3 (1) of the Order. That in turn attracted the provisions of clause 7 of the Order and made the respondent liable under section 7 of the Essential Commodities Act. On these findings the learned Magistrate convicted the respondent of the offence charged. He, however, held that it was not necessary to direct the forfeiture of the paddy and that the ends of justice would be met if he was fined to pay Rs. 500 in default to suffer rigorous imprisonment for three months.

Against this Order the respondent preferred an appeal before the learned Sessions Judge at Manipur. The learned Sessions Judge substantially agreed with the view taken by the learned Magistrate. He believed the witnesses who had referred to the circumstances under which the paddy stored in the godown of the respondent was recovered, and he held that the respondent had been properly convicted under section 7 of the Essential Commodities Act. The order of sentence also was confirmed.

The respondent then moved the Judicial Commissioner, Manipur, by a Revision Application and his Revision Application succeeded. It appears that before the present Revision Application came on for hearing before the learned Judicial Commissioner he had examined the question of law in regard to the construction of clause 3 (2) of the Order in a group of Revision Applications Nos. 7, 11 and 13 of 1961 and had pronounced his judgment on 5th June, 1961. He had held in that judgment that the effect of the presumption which can be legitimately raised under clause

3 (2) is not that the person against whom the said presumption has been drawn is a dealer in respect of the said goods; and so, merely on the strength of the said presumption, clause 3 (1) cannot be attracted; following his earlier decision the learned Judicial Commissioner allowed the respondent's Revision Application and set aside the order of conviction and sentence passed against him. It is against this order that the Manipur Administration has come to this Court by Special Leave, and on behalf of the appellant Mr. B. K. Khanna has contended that the view taken by the learned Judicial Commissioner is based on a misconstruction of clause 3 (2) of the Order. That is how the only question which falls for our decision in the present appeal is in regard to the construction of the said clause.

At this stage, it would be convenient to refer to the relevant provisions of the Order. Clause 2 (a) defines a dealer as meaning a person engaged in the business of purchase, sale or storage for sale, of any one or more of the foodgrains in quantity of one hundred maunds or more at any one time. Clause 2 (b) defines foodgrains as any one or more of the foodgrains specified in the Order including products of such foodgrains other than husk and bran. It is common ground that paddy is one of the foodgrains specified in Schedule I. Clause 3 with which we are directly concerned in this appeal reads thus :

"(1) No person shall carry on business as a dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority ;

(2) For the purpose of this clause any person who stores any foodgrains in quantity of one hundred maunds or more at any one time shall, unless the contrary is proved, be deemed to store the foodgrains for the purpose of sale."

Clause 7 provides that no holder of a licence issued under this Order shall contravene any of the terms and conditions of the licence, and if he has been found to have contravened them his licence is liable to be cancelled or suspended. These are the main provisions with which we are concerned in the present appeal.

In dealing with the point raised by Mr. Khanna before us, it is necessary to bear in mind that clause 3 in question ultimately imposes a penalty on the offender and as such, it is in the nature of a penal clause. Therefore, it is necessary that it must be strictly construed. There is no doubt, as Mr. Khanna has contended, that if clause 3 (2) which is in the nature of a deeming provision provides for a fiction, we ought to draw the fiction to the maximum extent legitimately permissible under the words of the clause. Mr. Khanna contends that the effect of clause 3 is that as soon as it is shown that the respondent had stored more than 100 mds. of paddy he must be deemed to have stored the said foodgrains for the purpose of sale; and his argument is that in drawing a statutory presumption under this clause, it is necessary to bear in mind that this presumption is drawn for the purpose of sub-clause (1) of clause 3. Therefore, it is urged that it would be defeating the purpose of clause 3 (2) if the view taken by the learned Judicial Commissioner is upheld, and the presumption raised under clause 3 (2) is not treated as sufficient to prove the charge against the respondent.

In dealing with the question as to whether the respondent is guilty under section 7 of the Essential Commodities Act, it is necessary to decide whether he can be said to be a dealer within the meaning of clause 3 of the Order. A dealer has been defined by clause 2 (a) and that definition we have already noticed. The said definition shows that before a person can be said to be a dealer it must be shown that he carries on business of purchase or sale or storage for sale of any of the commodities specified in the Schedule, and that the sale must be in quantity of 100 mds. or more at any one time. It would be noticed that the requirement is not that the person should merely sell, purchase or store the foodgrains in question, but that he must be carrying on the business of such purchase, sale, or storage; and the concept of business in the context must necessarily postulate continuity of transactions. It is not a single casual or solitary transaction of sale, purchase or storage that would make a person a dealer. It is only where it is shown that there is a

sort of continuity of one or the other of the said transactions that the requirements as to business postulated by the definition would be satisfied. If this element of the definition is ignored, it would be rendering the use of the word "business" redundant and meaningless. It has been fairly conceded before us by Mr. Khanna that the requirement that the transaction must be of 100 mds. or more at any one time governs all classes of dealings with the commodities specified in the definition. Whether it is a purchase or sale or storage at any one time it must be of 100 mds. or more. In other words, there is no dispute before us that retail transactions of less than 100 mds. of the prescribed commodities are outside the purview of the definition of a dealer.

The forms prescribed by the Order support the same conclusion. The form for making an application for licence shows that one of the columns which the applicant has to fill requires him to state how long the applicant has been trading in foodgrains, and another column requires him to state the place or places of his business. Similarly, Form B which prescribes the licence shows that the licence authorises the licence holder to purchase, sell or store for sale, the foodgrains specified in the licence, and clause 2 of the licence says that the licensee shall carry on the aforesaid business at the place indicated in the licence. Similarly, Form C which pertains to stocks shows that the particulars of the godown where stocks are held have to be indicated and the quantity sold and delivered as well as the quantity sold but not delivered have to be separately described. These Forms, therefore, support the conclusion that a dealer who comes within the definition prescribed by clause 2 (a) should be carrying on the business of purchase, sale or storage, and that would exclude solitary or single cases of sale, purchase or storage.

Bearing in mind this necessary implication of the definition of the word "dealer", let us proceed to inquire whether the respondent's case falls under clause 3 (1). Clause 3 (1) prohibits persons from carrying on business as dealers except under and in accordance with the terms of licence issued to them. In other words, whoever wants to carry on the business of a dealer must obtain a licence. There is no doubt that if a person carries on a business as described by clause 2 (a) and does it without obtaining a licence as required by clause 3 (1), he would be guilty under section 7 of the Essential Commodities Act. In this connection, clause 3 (2) raises a statutory presumption. It is no doubt a rebuttable presumption which is raised by this provision. If it is shown by a person with whom a storage of more than 100 mds. of one or the other of the prescribed foodgrains is found that the said storage was referable to his personal needs or to some other legitimate cause unconnected with and distinct from the purpose of sale, the presumption would be rebutted, in case, of course, the explanation given and proved by the person is accepted by the Court as reasonable and sufficient. What does this presumption amount to? It amounts to this and nothing more that the stock found with a given individual of 100 or more maunds of the specified foodgrains had been stored by him for the purpose of sale. Having reached this conclusion on the strength of presumption, the prosecution would still have to show that the store of the foodgrains for the purpose of sale thus presumed was made by him for the purpose of carrying on the business of storage of the said foodgrains. The element of business which is essential to attract the provisions of clause 3 (1) is thus not covered by the presumption raised under clause 3 (2). That part of the case would still have to be proved by the prosecution by other independent evidence. It may be that this part of the case can be proved by the prosecution by showing that store of 100 mds. or more of the foodgrains was found with the said person more than once. How many times it should be necessary to prove the discovery of such a store with the said person, is a matter which we need not decide in the present case. All that is necessary to be said in connection with the presumption under clause 3 (2) in this case is that after the presumption is raised under it, some evidence must be led which would justify the conclusion that the store which was made for the purpose of sale was made by the person for the purpose of carrying on the business.

Mr. Khanna contends that in construing the effect of clause 3 (2) we must remember that this clause makes direct reference to clause 3 (1), and that no doubt is true; but the fact that clause 3 (2) directly refers to clause 3 (1) does not help to widen the scope of the presumption which is allowed to be raised by it. The presumption would still be that the store is made for the purpose of sale, and that presumption would be drawn for the purpose of clause 3 (1). That is the only effect of the relevant words in clause 3 (2) on which Mr. Khanna relies.

Mr. Khanna then urges that if the Legislature had intended that after drawing the presumption about the storage for the purpose of sale, the prosecution should still have to cover some further ground and lead additional evidence to prove that the said store had been made for the purpose of business of storage, then the statutory presumption would really serve no useful purpose. There may be some force in this contention. But, on the other hand, in construing clause 3 (2), it would not be open to the Court to add any words to the said provision, and in fact as we have already indicated, the words reasonably construed cannot justify the raising of a presumption which would take in the requirement as to business which is one ingredient of the definition of a dealer. Therefore, we do not think that the argument urged by Mr. Khanna about the general policy underlying clause 3 (2) can assist his contention in view of the plain words used by clause 3 (2) itself.

It appears that clause 3 (2) may have been deliberately worded so as to raise a limited presumption in order to exclude cases of cultivators who may on occasions be in possession of more than 100 mds. of foodgrains grown in their fields. If a cultivator produces more than 100 mds. in his fields or otherwise comes into possession of such quantity of foodgrains once in a year and casually sells them or stores them, the Order apparently did not want to make such possession, sale or storage liable to be punished under clause 3 (1) read with section 7 of the Essential Commodities Act. However that may be, having regard to the words used in clause 3 (2), we are unable to hold that the Judicial Commissioner was wrong in coming to the conclusion that clause 3 (2) by itself would not sustain the prosecution case that the respondent is a dealer under clause 3 (1); and that inevitably means that the charge under section 7 of the Essential Commodities Act is not proved against him. That being so, we must hold that the order of acquittal passed by the Judicial Commissioner is right.

The appeal accordingly fails and is dismissed.

K.S.

Appeal dismissed.

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO AND J.R. MUDHOLKAR, JJ.

Mrs. M.N. Chubwala and another

.. *Appellants**

v.

Fida Hussain Saheb and others

.. *Respondents.*

Lease or licence—Test—Agreements by stall-holders stipulating payment of daily "rent" to owner of private market—If lease or licence—Considerations.

Whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement. In the absence however of a formal document the intention of the parties must be inferred from the circumstances and conduct of parties. So too, where the terms of the document evidencing the agreement between the parties are not clear the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties.

In the instant case each stall-holder in a private market could use the stall only during a stated period every day and subject to several conditions. This coupled with the fact that the responsibility

for cleaning the stalls, disinfecting them and of closing the market in which the stalls are situate is placed, by the Madras City Municipal Act, the Regulations made thereunder and the license issued to the landlords, on the landlords would indicate that the legal possession of the stalls must also be deemed to have been with the landlords and not with the stall-holders. The right which the stall-holders had was to the exclusive use of the stalls during stated hours and nothing more. Accordingly the intention of the parties was to bring into existence merely a licence and not a lease and the word "rent" was used loosely for "fee" payable every day in the agreement.

Though oral evidence to prove the terms of an agreement in writing would be excluded by section 92 of the Evidence Act under the Sixth Proviso to that section the surrounding circumstances can be taken into consideration for ascertaining the meaning of the word "rent" used in the agreements.

The mere necessity of giving notice to the licensee requiring him to vacate the licensed premises would not indicate that the transaction was a lease.

Appeal by Special Leave from the Judgment and Decree dated 17th February, 1959, of the Madras High Court in Second Appeal No. 252 of 1957.

S. (T.) Desai, Senior Advocate, (*R. Ganapathy Iyer*, Advocate with him), for Appellants.

R. Gopalakrishnan, Advocate, for Respondents Nos. 1 to 6.

The Judgment of the Court was delivered by

Mudholkar, J.—This is an appeal by Special Leave from the judgment of the High Court of Madras reversing the decisions of the Courts below and granting a number of reliefs to the plaintiffs-respondents.

The main point which arises for consideration in this appeal is whether the plaintiffs-respondents are the lessees of the appellants who were defendants 4 and 5 in the trial Court or only their licensees. In order to appreciate the point certain facts need to be stated.

The appellants are the owners of a private market situate in Madras known as Zam Bazar Market. There are about 500 old stalls in that market and meat, fish, vegetables etc., are sold in that market. The practice of the appellants has been to farm out to contractors the right to collect dues from the users of the stalls. Defendants 1 to 3 to the suit were the contractors appointed by the appellants for collecting rent at the time of the institution of suit. Two of these person died and their legal representatives have not been impleaded in appeal as they have no interest in the subject-matter of litigation. The third has been transposed as Respondent No. 7 to this appeal. They were, however, alive when the Special Leave petition was filed and were shown as appellants 1 to 3, but, two of them were struck out from the record after their death and the third transposed as Respondent No. 7. Though the building in which the market is located is owned by the appellants it cannot be used as a market for the purpose of sale of meat or any other article of human consumption without the permission of the Municipal Council under section 303 of the Madras City Municipal Act, 1919 (hereinafter referred to as the Act). Before such a permission is granted the owner has to obtain a licence from the Municipal Commissioner and undertake to comply with the terms of the licence. The licence granted to him would be for one year at a time but he would be eligible for renewal at the expiry of the period. Section 306 of the Act confers power on the Commissioner to require the owner, occupier or farmer of a private market for the sale of animal or article of food to do a number of things, for example, to keep it in a clean and proper state, to remove all filth and rubbish therefrom etc. Breach of any condition of the licence or of any order made by the Commissioner would result, under section 307 in suspension of the licence and thereafter it would not be lawful for any such person to keep open any such market. Section 308 of the Act confers powers on the Commissioner to make regulations for markets for various purposes such as fixing the days and hours on and during which any market may be held or kept for use, requiring that in the market building separate areas be set apart for different classes of articles, requiring every market building to be kept in a clean and proper state by removing filth and rubbish therefrom and requiring the provision of proper ventilation in the market building and of passages of sufficient width between the stalls therein for the convenient use of the building. We are told that regulations have been made by the Commissioner in pursuance of the powers conferred

upon him by section 308 of the Act. Thus as a result of the Act as well as the regulations made thereunder a number of duties appear to have been placed upon the owners of private markets. It would also appear that failure to comply with any of the requirements of the statute or the regulations would bring on the consequence of suspension or even cancellation of the licence. We are mentioning all this because it will have some bearing upon the interpretation of the documents on which the plaintiffs have relied in support of the contention that the relationship between them and the appellants is that of tenants and landlord.

The suit out of which this appeal arises came to be filed because disputes arose between the plaintiffs and the defendants 1 to 3 who became the contractors for collection of rent as from 9th February, 1956. These disputes were with regard to extra carcass fees and extra fees for Sunday Gutha which were claimed by the contractors. The respondents further alleged that the relationship between them and the appellants was, as already stated, that of lessees and lessors while according to the appellants, the respondents were only their licensees. The respondents further challenged the extra levies made by the contractors, *i.e.*, the original defendants 1 to 3 who were no longer in the picture. The reliefs sought by the respondents were for an injunction against the appellants and the defendants 1 to 3, restraining them from realising the extra levies and for further restraining them from interfering with their possession over their respective stalls as long as they continued to pay their dues. The First Additional City Civil Court Judge before whom the suit had been filed found in the respondent's favour that the extra fees sought to be levied by the contractor were sanctioned neither by the provisions of the Municipal Act nor by usage but upon the finding that the respondents were bare licensees and dismissed their suit.

The appellate bench of the City Civil Court before whom the respondents had preferred an appeal affirmed the lower Court's decision. The High Court reversed the decision of the Courts below and in the decree passed by it pursuant to its judgment granted a number of reliefs to the respondents. Here we are concerned only with reliefs (ii) (e), (f) and (g) since the appellants are not interested in the other reliefs. Those reliefs are :

" (ii) that the respondents-defendants, in particular defendants 1 to 3 (respondents 1 to 3) be and hereby are restrained from in any manner interfering with the appellants-plaintiffs 1 to 4, 6 and 7 carrying on their trade peacefully in their respective stalls at Zam Bazar Market, Royapettah, Madras, and imposing any restrictions or limitations upon their absolute right to carry on business as mentioned hereunder :

* * * * *

(e) Interfering with the possession and enjoyment of the respective stalls by the appellants-plaintiffs 1 to 4, 6 and 7 so long as they pay the rents fixed for each stall ;

(f) increasing the rents fixed for the appellants-plaintiffs 1 to 4, 6 and 7's stalls under the written agreements between the said plaintiffs and defendants 4 and 5 :

(g) evicting of the appellants-plaintiffs 1 to 4, 6 and 7 or disturbing the plaintiffs and their articles in their stalls by defendants 1 to 3. "

Further we are concerned in this case only with the relationship between the meat vendors occupying and using some of the stalls in the market (as the plaintiffs-respondents belong to this category) and the appellants-landlords. What relationship subsisted or subsisted between the appellants and other stall-holders vending other commodities is not a matter which can be regarded as relevant for the purpose of deciding the dispute between the appellants and the respondents.

It is common ground that under the licence granted by the Municipal Corporation, the market is to remain open between 4 A.M. and 11 P.M. and that at the end of the day the stall-holders have all to leave the place which has then to be swept and disinfected and that the gates of the market have to be locked. None of the stall-holders or their servants is allowed to stay in the market after closing time. In point of fact this market used to be opened at 5 A.M. and closed at 10 P.M. by which time all the stall-holders had to go away. It is also common ground that the stalls are open stalls and one stall is separated from the other only by a low brick

wall and thus there can be no question of a stall-holder being able to lock up his stall before leaving the market at the end of the day. The stall-holders were required to remove the carcasses brought by them for sale by the time the market closed. Meat being an article liable to speedy decay the stall-holders generally used to finish their business of vending during the afternoon itself and remove the carcasses. They, however, used to leave in their stalls wooden blocks for 'chopping' meat, weighing scales, meat choppers and other implements used by them in connection with their business. These used to be left either in boxes or almirahs kept in the stall and locked up therein.

It is also an admitted fact that some of the stall-holders have been carrying on business uninterruptedly in their stalls for as long as forty years while some of them have not been in occupation for more than five years. It is in evidence that these stall-holders have been executing fresh agreements governing their use and occupation of stalls and payment of what is styled in the agreements as rent whenever a new contractor was engaged by the appellants for collecting rents.

The next thing to be mentioned is that the agreements referred to the money or charges payable by the stall-holders to the landlords as 'rent' and not as 'fee'. It has, however, to be noted that the dues payable accrue from day to day. Thus in Exhibit A-1 the rent of Re. 1 is said to be payable every day by 1.00 P.M. In all these agreements there is a condition that in case there is default in payment of rent for three days the stall-holder was liable to be evicted by being given 24 hours' notice. A further condition in the agreements is that a stall-holder may be required by the landlord to vacate the stall after giving him 30 days' notice. There is a provision also regarding repairs in these agreements. The liability for the annual repairs is placed by the agreement upon the landlord and these repairs are ordinarily to be carried out in the month of June every year. Where however, repairs became necessary on the carelessness of a stall-holder they were to be carried out at the expense of that stall-holder. It may be also mentioned that these agreements are obtained by the contractors from the stall-holders in favour of the landlord and bear the signatures only of the stall-holders.

It was contended before us by Mr. R. Gopalakrishnan that in order to ascertain the relationship between the appellants and the respondents we must look at the agreements alone and that it was not open to us to look into extraneous matters such as the surrounding circumstances. It is claimed on behalf of the respondents that the lease in their favour is of a permanent nature. But if that were so, the absence of a registered instrument would stand in their way and they would not be permitted to prove the existence of that lease by parol evidence. From the fact, however, that with every change in the contractor a fresh agreement was executed by the stall-holders it would be legitimate to infer that whatever the nature of the right conferred by the agreement upon the stall-holders it could not be said to be one which entitle them to permanent occupation of the stalls. It could either be a licence as contended for by the appellant or a tenancy from month to month. In either case there would be no necessity for the execution of a written agreement signed by both the parties. Here, the agreements in question are in writing, though they have been signed by the stall-holders alone. All the same, oral evidence to prove their terms would be excluded by section 92 of the Evidence Act. To that extent Mr. Gopalakrishnan is right. Though that is so, under the 6th Proviso to that section the surrounding circumstances can be taken into consideration for ascertaining the meaning of the word 'rent' used in the agreements. Indeed, the very circumstance that rent is to fall due every day and in default of payment of rent for three days the stall-holder is liable to be evicted by being given only 24 hours' notice it would not be easy to say that this 'rent' is payable in respect of a lease. On the other hand, what is called rent may well be only a fee payable under licence. At any rate this circumstance shows that there is ambiguity in the document and on this ground also surrounding circumstances could be looked into for ascertaining the real relationship between the parties. Indeed, the City Civil Court has gone into

the surrounding circumstances and it is largely on the view it took of them that it found in favour of the appellants.

The High Court, however, has based itself upon the agreements themselves. To start with it pointed out—and in our opinion rightly—that the use of the word 'rent' in Exhibit A-1 did not carry the respondents' case far. The reasons given by it for coming to the conclusion that the transaction was a lease, are briefly as follows:

(1) Notice was required to be given to the stall-holder before he could be asked to vacate even on the ground of non-payment of rent ;

(2) the annual repairs were to be carried out by the landlord only in the month of June ;

(3) the stall-holder was liable to carry out the repairs at his own expense when they are occasioned by his carelessness ;

(4) even if the landlord wanted the stalls for his own purpose he could obtain possession not immediately but only after giving 30 days' notice to the stall-holder ;

(5) the possession of the stalls by the respondents had been continuous and unbroken by virtue of the terms of the agreement and that the terms of the original agreement were not shown to have been substituted by fresh agreements executed by the respondents.

The High Court, therefore, held that from the general tenor of the documents it is fairly clear that as between the appellants and the respondents the terms created only a tenancy in respect of the stall and not a mere licence or permissive occupation. After saying that if the occupation of the stall-holders was only permissive the condition as to payment of rent, eviction for default in payment of rent for more than 3 days the provisions for annual repairs being carried out by the landlord, the further provisions that repairs that might be occasioned by the carelessness of the respondents should be carried out at their expense and the adequate provision for 30 days' notice for vacating the stalls if they were required by the landlord would all seem to be inconsistent and irrelevant, it observed

"As a matter of fact, there is no evidence whatsoever to show that any of these plaintiffs were at any time turned out of their possession of their stalls at the will of the landlords or for default of any of the terms and conditions stipulated in the agreements. The specific provision for 30 days' notice for vacating and delivering possession seems to be conclusive of the fact that the plaintiffs were to occupy the stalls as permanent tenants and not as mere licensees. The terms of the agreements further disclose that the plaintiffs were to be in exclusive possession of these stalls for the purpose of their trade as long as they comply with the terms and until there was a notice of termination of their tenancy in respect of the shops held by them. The very tenor of the agreements the intention behind the terms contained in the agreements and the measure of control established by the terms of the agreements all point only to the fact that the plaintiffs were to be in undisturbed and exclusive possession of the stalls as long as they paid the rent and until there was a valid termination of their right to hold the stalls as such tenants."

While it is true that the essence of a licence is that it is revocable at the will of the grantor the provision in the licence that the licensee would be entitled to a notice before being required to vacate is not inconsistent with a licence. In England it has been held that a contractual licence may be revocable or irrevocable according to the express or implied terms of the contract between the parties. It has further been held that if the licensee under a revocable licence has brought property on to the land, he is entitled to notice of revocation and to a reasonable time for removing his property, and in which to make arrangements to carry on his business elsewhere. (see Halsbury's Laws of England, 3rd edition, Volume 23, page 431). Thus the mere necessity of giving a notice to a licensee requiring him to vacate the licensed premises would not indicate that the transaction was a lease. Indeed, section 62 (c) of the Indian Easements Act, 1882, itself provides that a licence is deemed to be revoked where it has been either granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled. In the agreements in

question the requirements of a notice is a condition and if that condition is fulfilled the licence will be deemed to be revoked under section 62. It would seem that it is this particular requirement in the agreements which has gone a long way to influence the High Court's finding that the transaction was a lease. Whether an agreement creates between the parties that relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. This intention has to be ascertained on a consideration of all the relevant provisions in the agreement. In the absence, however, of a formal document the intention of the parties must be inferred from the circumstance and conduct of the parties. (*Ibid* page 427). Here the terms of the document evidencing the agreement between the parties are not clear and so the surrounding circumstances and the conduct of the parties have also to be borne in mind for ascertaining the real relationship between the parties. Again, as already stated, the documents relied upon being merely agreements executed unilaterally by the stall-holders in favour of the landlords they cannot be said to be formal agreements between the parties. We must, therefore, look at the surrounding circumstances. One of those circumstances is whether actual possession of the stalls can be said to have continued with the landlords or whether it had passed on to the stall-holders. Even if it has passed to a person, his right to exclusive possession would not be conclusive evidence of the existence of a tenancy though that would be a consideration of first importance. That is what was held in *Errington v. Errington and Woods*¹ and *Cobb v. Lane*². These decisions reiterated the view which was taken in two earlier decisions. *Clore v. Theatrical Properties Ltd. and Westby and Co., Ltd.*³, and *Smith and Son v. The Assessment Committee for the Parish of Lambeth*⁴. Mr. S.T. Desai appearing for the appellants also relied on the decision of the High Court of Andhra Pradesh in *Vurum Subba Rao v. The Eluru Municipal Council*⁵ as laying down the same proposition. That was a case in which the High Court held that stall-holders in the municipal market were liable to pay what was called rent to the municipality, were not lessees but merely licensees. The fact, therefore, that a stall-holder has exclusive possession of the stall is not conclusive evidence of his being a lessee. If, however, exclusive possession to which a person is entitled under an agreement with a landlord is coupled with an interest in the property, the agreement would be construed not as a mere licence but as a lease. (see *Associated Hotels of India Ltd. v. R. N. Kapoor*⁶). In the case before us, however, while it is true that each stall-holder is entitled to the exclusive use of his stall from day to day it is clear that he has no right to use it as and when he chooses to do so or to sleep in the stall during the night after closure of the market or enter the stall during the night after 11-00 P. M. at his pleasure. He can use it only during a stated period every day and subject to several conditions. These circumstances, coupled with the fact that the responsibility for cleaning the stalls, disinfecting them and of closing the market in which the stalls are situate is placed by the Act, the Regulations made thereunder and the licence issued to the landlords is on the landlords would indicate that the legal possession of the stalls must also be deemed to have been with the landlords and not with the stall-holders. The right which the stall-holders had was to the exclusive use of the stalls during stated hours and nothing more. Looking at the matter in a slightly different way it would seem that it could never have been the intention of the parties to grant anything more than a licence to the stall-holders. The duties cast on the landlord by the Act are onerous and for performing those duties they were entitled to free and easy access to the stalls. They are also required to see to it that the market functioned only within the stated hours and not beyond them and also that the premises were used for no purpose other than of vending comestibles. A further duty which lay upon the landlords was to guard the entrance to the market. These duties could not be effectively carried out by the landlord by parting with possession in favour of the stall-holders by reason of which the performance by the landlords of their duties and obligations could easily be rendered impossible if the

1. L.R. (1952) 1 K.B. 290.

2. (1952) 1 All E.R.

3. (1936) 3 All E.R. 483.

4. (1882-83) 10 Q.B.D. 327 at 330.

5. I.L.R. (1956) A.P. 515 at pp. 520-524.

6. (1960) 1 S.C.R. 368.

stall-holders adopted an unreasonable attitude. If the landlords failed to perform their obligations they would be exposed to penalties under the Act and also stood in danger of having their licences revoked. Could in such circumstances the landlords have ever intended to part with possession in favour of the stall-holders and thus place themselves at the mercy of these people? We are, therefore, of the opinion that the intention of the parties was to bring into existence merely a licence and not a lease and the word 'rent' was used loosely for 'fee'.

Upon this view we must allow the appeal, set aside the decree of the High Court and dismiss the suit of the respondents in so far as it relates to reliefs (ii) (e), (f) and (g) granted by the High Court against the appellants are concerned. So far as the remaining reliefs granted by the High Court are concerned, its decree will stand. In the result we allow the appeal to the extent indicated above but in the particular circumstances of the case we order costs throughout will be borne by the parties as incurred.

K.S.

Appeal allowed in part.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, K. N. WANCHOO, K.C. DAS GUPTA, J. C. SHAH AND N. RAJAGOPALA AYYANGAR, JJ.

Haricharan Kurmi and another

.. *Appellants.**

v.

The State of Bihar

.. *Respondent.*

Evidence Act (I of 1872) section 30—Confession of co-accused—Admissibility and effect in criminal trials—Proper approach in considering such confessions.

In criminal trials there is no scope for applying the principle of moral conviction or grave suspicion. Where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confessions of a co-accused person the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him and so he is entitled to the benefit of doubt.

The confession is not evidence as strictly defined in section 3 of the Evidence Act. It is only an element which can be taken into consideration. The stage to consider the said confessional statements arrives only after the other evidence is considered and found to be satisfactory.

The Court is not entitled to consider the evidence supplied by the confessional statements made by the co-accused persons and enquire whether the said evidence received corroboration from any other evidence adduced by the prosecution. Section 30 of the Evidence Act merely enables the Court to take the confession into account.

Ram Prakash v. The State of Punjab, 1959 S.C.J. 181 : 1959 M.L.J. (Cr.) 51 : (1959) S.C.R. 1219, explained and reaffirmed.

Appeals by Special Leave from the Judgment and Order dated 17th August, 1963, of the Patna High Court in Criminal Appeals Nos. 554 and 556 of 1961.

T.V. R. Tatachari, Advocate (at State expense), for Appellants (In both the Appeals).

D. P. Singh and R. N. Sachthey, Advocates, for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Gajendragadkar, C.J.—The two appellants Haricharan Kurmi and Jogia Hajam were charged along with four other persons with having committed an offence punishable under section 396 of the Indian Penal Code, in that during the night intervening the 24th and the 25th March, 1960, they committed dacoity in the house of Deokinandan Jaiswal, and during the course of the said dacoity, they committed the murder of Damyanti Devi, wife of the said Deokinandan Jaiswal. The names of the four other accused persons are : Ram Bachan Ram, Jogender Singh, Ram Surat Choudhury and Achheylal Choudhury. The learned Sessions Judge, Muza-

farpur, who tried the case, found all the six accused persons guilty of the offence charged. He accordingly convicted them of the said offence and sentenced them to suffer imprisonment for life.

This order of conviction and sentence was challenged by the said six accused persons by preferring appeals before the Patna High Court. The High Court has held that the learned trial Judge was right in convicting five of the six appellants because, in its opinion, the evidence led by the prosecution proved the charge against them beyond reasonable doubt. In regard to Joginder Singh, however, the High Court was not inclined to agree with the conclusion of the trial Judge and gave benefit of doubt to him. Pending the hearing of these appeals, a rule for the enhancement of sentence was issued by the High Court against all the appellants. This rule has been discharged in regard to Jogender Singh who has been acquitted, as well as Ram Bachan Ram, Ram Surat Choudhury and Achheyal Choudhury and the sentence of imprisonment for life imposed on them by the trial Judge has been confirmed. In regard to the two appellants, however, the High Court took the view that the ends of justice require that the sentence of imprisonment for life imposed on them should be enhanced to that of death. Accordingly, the rule against them was made absolute and they have been ordered to be hanged. It is against this order of conviction and sentence that the present appeals have been brought before us by Special Leave; and the short question of law which has been raised before us by Mr. Tatachari is that the High Court has erred in law in treating the confession made by the co-accused Ram Surat Choudhury as substantive evidence against them. This course adopted by the High Court in dealing with the case of the appellants on the basis of confession made by the co-accused person is, it is urged, inconsistent with the consensus of judicial opinion in regard to the true scope and effect of section 30 of the Indian Evidence Act (hereinafter called 'the Act').

These appeals were argued before a Division Bench of three learned Judges of this Court and it was brought to the notice of the said Bench that in dealing with the case of the appellants in the light of the confession made by a co-accused person, the High Court had relied on the observations made by this Court in *Ram Prakash v. The State of Punjab*¹. Since these observations, *prima facie*, supported the view taken by the Patna High Court, the Division Bench thought it necessary to refer this matter to a larger Bench in order that the correctness of the said observation may be examined. That is how these appeals have come before a Constitution Bench.

The facts leading to the prosecution of the appellants lie within a narrow compass, and so far as the point which falls to be considered in the present appeals is concerned, there is no dispute in respect of the said facts. Deokinandan Jaiswal is a fairly wealthy businessman and lives in village Dumarbana within the Police Station of Baigania in the District of Muzaffarpur. He has a house of his own. Achheyal and Ram Bachan served under him as munims. Jogender Singh was Jaiswal's sepoy and Ram Surat was his personal servant. The appellants are the co-villagers of Jogender Singh who was one of the accused persons. It appears that on 24th March, 1960, Jaiswal had received Rs. 15,000 in currency notes from his partner Nathmal Marwari in the presence of his munims Achheyal and Ram Bachan; in fact, as the said amount was handed over to Jaiswal in the form of different currency notes, Ram Bachan and Achheyal were asked by him to count the said amounts. The said amount was then put in different bundles by Jaiswal and to it was added another amount of Rs. 2,000 which he took out from his iron safe. The two bundles were then put together in a bigger bundle and to it was attached a slip containing his signature and date. According to Jaiswal, he handed over the amount of Rs. 17,000 thus put in two bundles to his wife Damyanti Devi and in her turn, she put the said bundles into the iron safe which had been kept at the first floor of the house in the room adjoining the bed-room. About this time, some functions were organised by the Bharat Sevak Samaj in the village and Jaiswal was the convener in regard to the

1. (1959) M.L.J. (Cr.) 51 : (1959) S.C.J. 181 : (1959) S.C.R. 1219.

said functions. Naturally, he had to attend to the delegates who had come to the village for the said function. During the days of these functions, Jaiswal used to return home by about 10 P.M. but on the night of 24th March, 1960, the function went on late, and so, Jaiswal slept at the Dharmashala where the function took place and did not return home. That is how Damyanti Devi was left alone in the house on the first floor and her only companion was her child Mina about $3\frac{1}{2}$ years old. Apparently, Damyanti Devi retired to her bed-room with her little child and on the ground floor were sleeping three of the accused persons, Achheylal Ram Bachan and Jogender Singh. Ram Surat was on leave, so that out of the four servants employed by Jaiswal, three were sleeping on the premises. Batahu, the cook of the family, was sleeping in a verandha attached to the motor garage.

Next day, Batahu was awakened by Achheylal who reported to him that the door of the hall was open. Thereupon, Achheylal and this witness went on the first floor and found that Damyanti Devi was lying dead in a pool of blood. There were cut injuries in her neck which had presumably caused severe bleeding. The little girl Mina was fast asleep. The bundles of currency notes had been removed by the miscreants who had committed the murder of Damyanti Devi. Thereupon, word was sent to Jaiswal and on his return to the house, steps were taken to report to the Police Station about the commission of the offence; and that set the investigation machinery into operation. As a result of the investigation, the six accused persons were put up for their trial for the offence under section 396, Indian Penal Code. That, in brief, is the nature of the prosecution case.

The prosecution sought to prove its case against the six accused persons by relying on the confessions made by three of them, the recovery of the stolen property and discovery of blood-stained clothes in respect of the two appellants. There is no direct evidence to show how, when and by whom the offence was committed. Besides the confessions, the evidence on which the prosecution relies is circumstantial and it is on this evidence that the case has been tried in the Courts below. For our purpose in the present appeals, it is unnecessary to refer to the details set out by the confessional statements in regard to the commission of the offence and the part played by each one of the accused persons.

Ram Surat, Achheylal and Ram Bachan made confessions and it has been held by the High Court as well as the learned Sessions Judge that the charge against them is proved. With the correctness or propriety of the conviction of these accused persons we are not concerned in the present appeals. The only point to which reference must be made at this stage is that there is a concurrent finding of the Courts below that the confession made by Ram Surat is voluntary and true. In fact, both the Courts did not feel any hesitation in taking the said confession into account against Ram Surat who made the said confession and convicting him on the said confession read in the light of other evidence adduced against him. The charge against the two appellants has been sought to be proved by the prosecution by the statements contained in the confessions made by the three accused persons and certain other discoveries, such as blood-stained clothes with both of them and stains of blood in the house of the appellant Haricharan. We will presently refer to this evidence. The High Court took the view that having regard to the decision of this Court in the case of *Ram Prakash*¹, it was open to the High Court to consider the evidence supplied by the confessional statement made by the co-accused persons and enquire whether the said evidence received corroboration from any other evidence adduced by the prosecution. Approaching the question from this point of view, the High Court came to the conclusion that the blood stains on the clothes found with both the appellants and blood stains found in the house of the appellant Haricharan afforded sufficient corroboration to the conviction of Ram Surat, and so, it has confirmed the conviction of the two appellants under section 396, Indian Penal Code.

The High Court then considered the question about the sentence which should be imposed on the two appellants. It appeared from the confession of Ram Surat as well as the confessional statements of Achheylal and Ram Bachan that the two appellants had played a major part in the commission of the offence. In fact, the injuries which proved fatal are alleged by all the three accused persons who confessed to have been caused by the two appellants. It is in the light of these statements that the High Court was persuaded to enhance the sentence imposed by the trial Judge against the appellants and it has directed that instead of imprisonment for life, the sentence of death ought to be imposed on them. That is how the only question which calls for our decision in the present appeals is : Is the approach adopted by the High Court justified by the provisions of section 30 of the Act as it has been consistently interpreted by judicial decisions for more than half a century ?

Before we address ourselves to this question of law, we may briefly indicate the nature of the other evidence on which the prosecution relies against the appellants. The appellants were arrested the next day after the commission of the offence on the report made by Jaiswal that he suspected that the murder of his wife had been committed by his four employees and their accomplices, the two appellants before us. On 26th March, 1960, at about 3.30 P.M. the investigation officer visited the lane between the southern wall of Jaiswal's godown and the northern wall of the east-facing room of the appellant Haricharan and found some blood stains in the lane and on the walls of the grain godown. Later, a shirt bearing blood stains was also found. Pieces of earth containing blood stains and the shirt were subsequently sent to the Chemical Analyser. The origin of the blood found on the pieces of earth sent to the Chemical Analyser could not be determined by him, but the stains of blood on the shirt which was seized from the person of the appellant Haricharan were found to have traces of human blood. Similarly, the nails of Haricharan's hands showed traces of blood and they were got cut by a barber and sent to the Chemical Analyser. The report shows that these blood stains were too small for serological test. The High Court thought that "the presence of human blood on the shirt which Haricharan was wearing, his nails and at several places beginning from the lane leading to his house and on so many materials kept in his house is a factor" which had to be taken into account. These discoveries were made about 8 A.M. following the night of the murder.

In regard to the appellant Jogia, a red-coloured check Gamcha which bore blood-like stains was recovered from the top of the earthen granary in his house at about 6 A.M. on 27th March, 1960. This Gamcha was sent to the Chemical Analyser and it is reported to bear stains of human blood. It may be added that when the house of Jogia was searched on 26th March, 1960, this Gamcha was not found. As we have just indicated, the judgment of the High Court shows that it took the view that the confessional statement by the co-accused persons of the appellants, particularly Ram Surat was corroborated by the discovery of blood stains and that justified the conviction of the appellants under section 396 of the Indian Penal Code.

The question about the part which confession made by a co-accused person can play in a criminal trial, has to be determined in the light of the provisions of section 30 of the Act. Section 30 provides that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such person is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. The basis on which this provision is founded is that if a person makes a confession implicating himself, that may suggest that the maker of the confession is speaking the truth. Normally, if a statement made by an accused person is found to be voluntary and it amounts to a confession in the sense that it implicates the maker, it is not likely that the maker would implicate himself untruly, and so, section 30 provides that such a confessions may be taken into consideration even against a co-accused who is being tried along with the maker of the confession. There is no doubt that a confession made voluntarily by an accus-

ed person can be used against the maker of the confession, though as a matter of prudence criminal Courts generally require some corroboration to the said confession particularly if it has been retracted. With that aspect of the problem, however, we are not concerned in the present appeals. When section 30 provides that the confession of a co-accused may be taken into consideration, what exactly is the scope and effect of such taking into consideration is precisely the problem which has been raised in the present appeals. It is clear that the confession mentioned in section 30 is not evidence under section 3 of the Act. Section 3 defines "evidence" as meaning and including :—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry: such statements are called oral evidence ;

(2) all documents produced for the inspection of the Court :

Such documents are called documentary evidence. Technically construed, this definition will not apply to a confession. Part (1) of the definition refers to oral statements which the Court permits or requires to be made before it ; and clearly a confession made by an accused person is not such a statement ; it is not made or permitted to be made before the Court that tries the criminal case ; Part (2) of the definition refers to documents produced for the inspection of the Court ; and a confession cannot be said to fall even under this part. Even so, section 30 provides that a confession may be taken into consideration not only against its maker, but also against a co-accused person; that is to say, though such a confession may not be evidence as strictly defined by section 3 of the Act, it is an element which may be taken into consideration by the criminal Court and in that sense, it may be described as evidence in a non-technical way. But it is significant that like other evidence which is produced before the Court, it is not obligatory on the Court to take the confession into account. When evidence as defined by the Act, is produced before the Court, it is the duty of the Court to consider that evidence. What weight should be attached to such evidence, is a matter in the discretion of the Court. But a Court cannot say in respect of such evidence that it will just not take that evidence into account. Such an approach can, however, be adopted by the Court in dealing with a confession, because section 30 merely enables the Court to take the confession into account.

As we have already indicated, this question has been considered on several occasions by judicial decisions and it has been consistently held that a confession cannot be treated as evidence which is substantive evidence against a co-accused person. In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. As was observed by Sir Lawrence Jenkins in *Emperor v. Lalit Mohan Chuckerburty*¹, a confession can only be used to "lend assurance to other evidence against a co-accused". In *re Periyaswami Moopan*² Reilly, J., observed that the provision of section 30 goes not further than this :

"where there is evidence against the co-accused sufficient, if believed, to support his conviction then the kind of confession described in section 30 may be thrown into the scale as an additional reason for believing that evidence."

In *Bhuboni Sahu v. The King*³, the Privy Council has expressed the same view. Sir John Beaumont who spoke for the Board, observed that :

"a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a

1. (1911) I.L.R. 38 Cal. 559 at 588.

3. (1949) L.R. 76 I.A. 147 at 155 : (1949) 2

2. (1913) I.L.R. 54 Mad. 75 at 77 : 59 M.L.J. 194.

M.L.J. 471.

much weaker type of evidence than the evidence of an approver, which is not subject to any of those infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby no doubt, makes it evidence on which the Court may act ; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case ; it can be put into the scale and weighed with the other evidence."

It would be noticed that as a result of the provisions contained in section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence ; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of section 30, the fact remains that it is not evidence as defined by section 3 of the Act. The result, therefore, is that in dealing with a case against an accused persons the Court cannot start with the confession of a co-accused person ; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That, briefly stated, is the effect of the provisions contained in section 30. The same view has been expressed by this Court in *Kashmira Singh v. State of Madhya Pradesh*¹, where the decision of the Privy Council in *Bhuboni Sahu's case*² has been cited with approval.

In appreciating the full effect of the provisions contained in section 30, it may be useful to refer to the position of the evidence given by an accomplice under section 133 of the Act. Section 133 provides that an accomplice shall be a competent witness against an accused person ; and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. *Illustration (b)* to section 114 of the Act brings out the legal position that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Reading these two provisions together, it follows that though an accomplice is a competent witness, prudence requires that his evidence should not be acted upon unless it is materially corroborated ; and that is the effect of judicial decisions dealing with this point. The point of significance is that when the Court deals with the evidence by an accomplice, the Court may treat the said evidence as substantive evidence and enquire whether it is materially corroborated or not. The testimony of the accomplice is evidence under section 3 of the Act and has to be dealt with as such. It is no doubt evidence of a tainted character and as such, is very weak ; but, nevertheless, it is evidence and may be acted upon, subject to the requirement which has now become virtually a part of the law that it is corroborated in material particulars.

The statements contained in the confessions of the co-accused persons stand on a different footing. In cases where such confessions are relied upon by the prosecution against an accused person, the Court cannot begin with the examination of the said statements. The stage to consider the said confessional statements arrives only after the other evidence is considered and found to be satisfactory. The difference in the approach which the Court has to adopt in dealing with these two types of evidence is thus clear, well understood and well-established. It, however appears that in *Ram Prakash's case*³, some observations have been made which do not seem to recognise the distinction between the evidence of an accomplice and the statements contained in the confession made by an accused person. "An examination of the reported decisions of the various High Courts in India," said Imam, J., who spoke for the Court in that case,

" indicates that the preponderance of opinion is in favour of the view that the 'retracted' confession of an accused person may be taken into consideration against a co-accused by virtue of the provisions of section 30 of the Act, its value was extremely weak and there could be no conviction without the fullest and strongest corroboration on material particulars."

1. (1952) S.C.J. 201 : 1952) 1 M.L.J. 754: I.A. 147 at 155.
 (1952) S.C.R. 526: 3. (1959) M.L.J. (Gr.) 51: (1959) S.C.R.
 2. (1949) 2 M.L.J. 194: (1949) L.R. 76 1219: (1959) S.C.J. 181.

The last portion of this observation has been interpreted by the High Court in the present case as supporting the view that like the evidence of an accomplice, a confessional statement of a co-accused person can be acted upon if it is corroborated in material particulars. In our opinion, the context in which the said observation was made by this Court shows that this Court did not intend to lay down any such proposition. In fact, the other evidence against the appellant Ram Prakash was of such a strong character that this Court agreed with the conclusion of the High Court and held that the said evidence was satisfactory and in that connection, the confessional statement of the co-accused person was considered. We are, therefore, satisfied that the High Court was in error in this case in taking the view that the decision in *Ram Prakash's case*¹ was intended to strike a discordant note from the well-established principles in regard to the admissibility and the effect of confessional statements made by co-accused persons.

Considering the evidence from this point of view, we must first decide whether the evidence other than the confessional statements of the co-accused persons, particularly Ram Surat, on whose confession the High Court has substantially relied, is satisfactory and tends to prove the prosecution case. It is only if the said evidence is satisfactory and is treated as sufficient by us to hold the charge proved against the two appellants, that an occasion may arise to seek for an assurance for our conclusion from the said confession. Thus, considered, there can be no doubt that the evidence about the discovery of blood stains on which the prosecution relies is entirely insufficient to justify the prosecution charge against both the appellants. In our opinion, it is impossible to accede to the argument urged before us by Mr. Singh that the said evidence can be said to prove the prosecution case. In fact, the judgment of the High Court shows that it made a finding against the appellants substantially because it thought that the confession of the co-accused persons could be first considered and the rest of the evidence could be treated as corroborating the said confessions. We are, therefore, satisfied that the High Court was not right in confirming the conviction of the two appellants under section 396 of the Indian Penal Code.

It is true that the confession made by Ram Surat is a detailed statement and it attributes to the two appellants a major part in the commission of the offence. It is also true that the said confession has been found to be voluntary, and true so far as the part played by Ram Surat himself is concerned, and so, it is not unlikely that the confessional statement in regard to the part played by the two appellants may also be true; and in that sense, the reading of the said confession may raise a serious suspicion against the accused. But it is precisely in such cases that the true legal approach must be adopted and suspicion, however grave, must not be allowed to take the place of proof. As we have already indicated, it has been a recognised principle of the administration of criminal law in this country for over half a century that the confession of a co-accused person cannot be treated as a substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. In criminal trials, there is no scope for applying the principle of moral conviction or grave suspicion. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt. That is precisely what has happened in these appeals.

In the result, the appeals are allowed and the orders of conviction and sentence passed against the two appellants Haricharan Kurmi and Jogia Hajam are set aside and the accused are ordered to be acquitted.

K.S.

Appeals allowed.

1. (1959) M.L.J. (Cr.) 51 : (1959) S.C.R. 1219: (1959) S.C.J. 181.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—P. B. GAJENDRAGADKAR, *Chief Justice*, A. K. SARKAR, K. N. WANCHOO, K. C. DAS GUPTA AND N. RAJAGOPALA AYYANGAR, JJ.

Abdul Sattar Haji Ibrahim Patel

... Appellant*

v.

The State of Gujarat

... Respondent.

Foreigners Act (XXXI of 1946), sections 14 and 9—Scope—Prosecution under section 14—Question whether person prosecuted is foreigner or not—Burden of proof in cases falling under section 9.

Where a person is being prosecuted under section 14 of the *Foreigners Act (XXXI of 1946)*, in determining the question as to whether he is a foreigner within the meaning of the said Act or not, section 9 of the said Act will have to be borne in mind. Section 9 applies to all cases under the Act which do not fall under section 8. Under section 9 the Legislature has placed the burden of proof on a person who is accused of an offence punishable under section 14. This section provides *inter alia* that where any question arises with reference to the said Act, or any order made or direction given thereunder, whether any person is or is not a foreigner; the onus of proving that such a person is not a foreigner, shall notwithstanding anything contained in the Evidence Act, lie upon such person. That person must show that he was domiciled in the territory of India on 26th January, 1950, and that he satisfied one of the three conditions prescribed by clauses (a) (b) and (c) of Article 5 of the Constitution of India (1950). If the person prosecuted is shown to have lost his domicile in India on 26th January, 1950, there would be no doubt that Article 5 would be inapplicable to him and the case may have to be decided under Article 7. On the other hand, if the person prosecuted is able to show that he did not leave India until 1954 the case would fall under Article 5, and if the prosecution desires to treat him as a foreigner it would be necessary for the prosecution to take action under the relevant provisions of the Citizenship Act read with Article 9.

[The case was remanded for additional evidence to be adduced on the question].

Appeal from the Judgment and Order dated 12th September, 1961, of the Gujarat High Court in Criminal Appeal No. 563 of 1960.

Bishan Narain, Senior Advocate, (*Ravinder Narain, J. B. Dadachanji* and *O. C. Mathur*, Advocates of *M/s. J. B. Dadachanji & Co.*, with him), for Appellant.

H. R. Khanna and *B. R. G. K. Achar*, Advocates, for Respondent.

The Judgment of the Court was delivered by

Gajendragadkar, C. J.—This is an appeal by Abdul Sattar Ibrahim Patel by which he challenges the correctness and validity of the order passed by the High Court of Gujarat, convicting him under section 14 of the *Foreigners Act (XXXI of 1946)* and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of rupees one thousand, in default rigorous imprisonment for one year. The appellant was charged before the Judicial Magistrate (1st Class) at Godhra with having committed an offence under section 14 of the *Foreigners Act*. The case against him was that he was a foreigner and a national of Pakistan, and as such had obtained Passport No. 351544 from the Government of Pakistan on 11th August, 1955, and had secured a 'C' Visa No. 22144, on 5th October, 1957. It was alleged that with the said passport and 'C' Visa the appellant entered India on 13th October, 1957, and obtained residential permit No. 322/57 valid upto 12th December, 1957. The said permit was extended from time to time until 12th April, 1958. Since the appellant did not leave India even though the residential permit issued in his favour had expired, he was alleged to have contravened the provisions of clause 7 of the *Foreigners Order, 1948*, and thereby rendered himself liable to be punished under section 14 of the *Foreigners Act, 1946*.

In resisting the charge thus framed against him the appellant urged that he had not gone to Pakistan at all till the month of August, 1954. He pleaded that his parents were born in Godhra and they and all his brothers were and are living in Godhra all the time. He claimed the status of an Indian citizen and denied the charge against him that he was a foreigner. According to him, his marriage had taken place in Godhra, and preceding his marriage he had also been educated in Godhra. In the month of March, 1948, his father-in-law, Yusuf

Haji Ismail, went to Pakistan and along with him went his wife. In 1954 the appellant had to go to Pakistan to bring back his wife to India, and in order to travel to Pakistan he made an application for a passport and obtained an Indian Passport No. C. 041323 bearing the date 8th April, 1954. Having travelled to Karachi with the Indian Passport, the appellant wanted to return with his wife to India, but his passport was deliberately taken away or destroyed by his father-in-law with a view to compel him to stay at Karachi, and that made it necessary for the appellant to obtain a Pakistani passport in order to come back to his country. He was advised that unless he obtained a Pakistani passport, he would not be able to return to India. That is how the main point raised by the appellant in defence against the charge framed by the learned Magistrate was whether he was and continued to be an Indian citizen at all material times.

The prosecution sought to prove its case mainly by relying on the passport obtained by the appellant, after making statements in his application for the said passport. The prosecution case was that the appellant had specifically admitted that he was a Pakistani citizen and had obtained a passport as such, and this, according to the prosecution, had happened long before 1954. The appellant led evidence to show that he was in India until 1954 and, as we have already indicated, he explained his conduct in obtaining a Pakistani passport on the ground that circumstanced as he was in Karachi, he was helpless and he adopted a course which appeared to him to be the only course available for coming back to India.

The learned Magistrate who tried the case was not satisfied that the prosecution had proved the charge against the appellant beyond reasonable doubt. Having regard to the evidence produced before him the learned Magistrate held that the case against the appellant under section 14 could not be said to be established. In the result, the appellant was acquitted under section 251-A (11) of the Criminal Procedure Code. The respondent, the State of Gujarat, then preferred an appeal against the said order of acquittal. It was urged by the appellant before the High Court that the High Court would not be justified in interfering with the order of acquittal passed by the learned trial Magistrate. But the High Court took the view that the question raised for its decision was of some importance; and having considered the point of law argued before it and having examined the evidence on which the parties relied, the High Court held that the charge had been proved against the appellant and so it set aside the order of acquittal and convicted him under section 14. The appellant then applied for and obtained a certificate from the High Court to come to this Court, and it is with the said certificate that the present appeal has been brought before us.

The true legal position in regard to the status of a citizen like the appellant is not in doubt. Article 5 of the Constitution provides that any person who has his domicile in the territory of India at the commencement of the Constitution and who satisfies one of the three conditions specified by clauses (a), (b) and (c) of the said Article shall be a citizen of India. The three conditions are alternative and not cumulative, and so, if any one of those conditions is satisfied, a person would be deemed to be a citizen of India if he had his domicile in the territory of India on 26th January, 1950. It is, however, important to bear in mind that the basic condition is that the person must have his domicile in India on the date when the Constitution came into force. If that condition is satisfied, the person must show that he was either born in India, or either of his parents were born in India or he had been ordinarily resident in India for not less than five years immediately preceding such commencement.

Article 7 with which we are concerned in the present appeal provides that notwithstanding anything contained in Articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India. There is a Proviso to this Article but that Proviso is not relevant for our purpose. This Article says that if a person is shown to have migrated after the 1st of March, 1947, from India to Pakistan he could not claim the status of an Indian citizen, notwithstanding the fact that he may satisfy the three conditions prescribed by Article 5. It has

been settled by the decisions of this Court that the migration to which Article 7 refers must have taken place between 1st March, 1947 and 26th January, 1950 (vide *State of Madhya Pradesh v. Peer Mohd.*¹).

Cases in which migration has taken place after 26th January, 1950, fall to be considered under Article 9 of the Constitution. Article 9 provides that no person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State.

It is necessary to emphasize in this connection that the requirement of migration postulates that the person must have left India with the intention of residing permanently in Pakistan. Leaving India casually for a specific purpose without intending to settle down permanently in Pakistan would not amount to migration (vide *Smt. Shanno Devi v. Mangal Sain*²).

In dealing with the cases falling under Article 9 it is necessary to take recourse to the relevant provisions of the Citizenship Act, 1955, and the Rules framed thereunder. In *Izhar Ahmed Khan v. The Union of India*³, it has been held by this Court that rule 3 of Schedule III, framed under section 9 (2) of the Citizenship Act is valid, and so, whenever a question as to whether a person has acquired the citizenship of a foreign State falls to be considered, the jurisdiction to decide that question vests exclusively in the Government of India, and in determining the said question the Government of India may exercise its powers as prescribed by the relevant Rules and may reach its decision in the light of rule 3 of Schedule III. It has also been held that if the question about the acquisition of citizenship of a foreign country has not been determined, in respect of any person, by the Government of India as prescribed by the relevant Rules, it would not be open to any State to prosecute the said person on the basis that he has lost his citizenship of India and has acquired the citizenship of a foreign country. A decision by the Government of India is a condition precedent in that behalf (vide *Government of Andhra Pradesh v. Syed Mohd. Khan*⁴).

There is one more point which deserves to be mentioned before dealing with the merits of the case. The appellant is being prosecuted under section 14 of the Foreigners Act, 1946 (XXXI of 1946). In determining the question as to whether he is a foreigner within the meaning of the said Act or not, section 9 of the said Act will have to be borne in mind. Section 9 applies to all cases under the Act which do not fall under section 8, and this case does not fall under section 8, and so, section 9 is relevant. Under this section, the Legislature has placed the burden of proof on a person who is accused of an offence punishable under section 14. This section provides *inter alia* that where any question arises with reference to the said Act, or any order made, or direction given thereunder, whether any person is or is not a foreigner, the onus of proving that such a person is not a foreigner, shall notwithstanding anything contained in the Indian Evidence Act, lie upon such person; so that in the present proceedings in deciding the question as to whether the appellant was an Indian citizen within the meaning of Article 5, the onus of proof will have to be placed on the appellant to show that he was domiciled in the territory of India on 26th January, 1950, and that he satisfied one of the three conditions prescribed by clauses (a), (b) and (c) of the said Article. It is on this basis that the trial of the appellant will have to proceed.

Reverting then to the material facts in this case, the main issue which had to be decided was whether the appellant satisfies the requirements of Article 5. His case was that he had his domicile in India on 26th January, 1950, and he satisfies the tests prescribed both by clauses (a) and (b) of Article 5. There is no dispute that the appellant was born at Godhra and that his parents also were born at Godhra. In fact, it is common ground that the family of the appellant is still domiciled in

1. (1963) 2 S.C.J. 655 : A.I.R. 1963 S.C. 645. 4. (1963) 2 S.C.J. 1178 : (1963) 2 M.L.J. (S.C.) 62 : (1963) 2 An.W.R. (S.C.) 62 : A.I.R. 1962 S.C. 1778.
2. (1961) 1 S.C.J. 201 : A.I.R. 1961 S.C. 58. 3. A.I.R. 1962 S.C. 1052.

India and his brothers and parents continue to enjoy the status of Indian citizens. The prosecution, however, alleged that he had left India sometime in 1948, and so, Article 5 was inapplicable to him, and his case had to be determined under Article 7. If the appellant is shown to have lost his domicile in India on 26th January, 1950, there would be no doubt that Article 5 would be inapplicable to him and the case may have to be decided under Article 7. On the other hand, if the appellant is able to show that he did not leave India until 1954, the case would fall under Article 5, and if the prosecution desires to treat the appellant as a foreigner it would be necessary for the prosecution to take action under the relevant provisions of the Citizenship Act, read with Article 9. Such a course has not been adopted, and it is, therefore, unnecessary to consider any facts which would be relevant in that behalf.

So the narrow question is : does the appellant show that he was domiciled in India and was residing in India on 26th January, 1950? On this point, the appellant led oral and documentary evidence which has been considered by the Trial Judge as well as the High Court. The Trial Judge was to some extent impressed by the said evidence, but the High Court has rejected that evidence and has made a definite finding that the appellant had failed to establish that an Indian Passport had been issued to him in 1954 or at any time. In dealing with this question the High Court has no doubt made some observations as to the true scope and effect of the provisions contained in Articles 5, 7 and 9, which do not correctly represent the true legal position in that behalf. But it is unnecessary for us to comment on those observations because we are satisfied that the appellant is entitled to have an opportunity to prove his case that he was staying in India until 1954, and left India on an Indian passport issued to him in that year. Therefore, we do not propose to express any opinion on the evidence adduced by the respective parties, at this stage. In view of the conclusion that we have reached, we would prefer to leave the matter to be decided by the learned Magistrate afresh in the light of the additional evidence which we propose to permit the appellant to produce before him.

It appears that during the course of the trial the appellant wanted to prove his case that he had obtained an Indian passport in 1954 by examining certain witnesses, and in that behalf he filed a list of witnesses on 21st January, 1960. Amongst these witnesses was witness No. 6 Clerk of the D.F.O. of the Assistant Secretary, Political and Services Department and he was called upon to produce the original or copy of the Indian Passport No. C.O. 41323 dated 8th April, 1954, given to the appellant and all applications made by the appellant in regard to it. The list contained the names of other witnesses also, some of whom were examined. Summons to the 6th witness was sent through the Chief Secretary to the Government of Bombay. For no fault of the appellant, the witness did not turn up and the passport was not produced, and, as we have already stated, the other evidence adduced by the appellant was not accepted by the High Court.

When the matter was argued before us, Mr. Bishan Narain stated that as a result of an earlier order passed by this Court, the record in regard to the appellant's Indian passport had been sent for and he wanted an opportunity to satisfy us that the said record fully established his case. That is why though the appeal was argued elaborately before us on 17th December, 1963, we ordered that it should be treated as part heard, and gave opportunity to Mr. Bishan Narain to mention it to us again after the record was received. Thereafter part of the record has been received and the matter has been further argued before us. This record does not contain the Indian passport issued to the appellant on which he has relied. But it *prima facie* seems to support his case. The documents which have been sent to this Court indicate that the appellant had applied for a passport in March, 1954, and after the said application was received by the District Magistrate, Panchmahal, the usual enquiry was made. The questions on which the enquiry was made are set out in the document sent to this Court, and the endorsement made in respect of the said items of enquiry is also to be found on the document. These endorsements read in the light of the questions tend to show that on 13th March, 1954, the Police Sub-Inspector of Godhra was satisfied from his own enquiry that the appellant

wanted to go to his aunt and to his father-in-law, who was staying in Pakistan where he had gone before the Godhra riots. The endorsements further show that, according to the Sub-Inspector, the appellant was a citizen of India at the relevant date, which is 13th March, 1954. The Sub-Inspector also said that he saw no objection or reasons to refuse an Indian passport to the appellant. If the contents of this document are proved, there would be no difficulty in establishing the identity of the appellant with the person to whom the said contents refer. In that case the appellant's version that he was an Indian citizen up to March, 1954 and had obtained a passport about that time would receive considerable corroboration. Documentary evidence of this type, coming from official custody, would undoubtedly go a long way in favour of the appellant when the Court considers the other evidence already adduced by him. We are, therefore, inclined to take the view that the appellant should be given a chance to prove this evidence and the issue in question should be determined afresh in the light of this evidence and such other evidence as may be adduced by the parties hereafter, as well as the evidence already on record. The appellant has been struggling to assert his status as a citizen of India during all these years, and if in fact he applied for Indian passport in March, 1954, we see no reason why he should not be given an opportunity to prove his case, particularly when the failure of the official witness to appear before the Court in time cannot be said to be the result of any default on the part of the appellant. We would accordingly set aside the order of conviction and sentence passed by the High Court against the appellant and remand the case to the Court of the Judicial Magistrate, First Class, at Godhra, with the direction that he should give opportunity to the appellant and the prosecution to lead further evidence on the points at issue and should consider the whole of the evidence, and then make his findings.

The result is : the appeal is allowed, the orders of conviction and sentence are set aside, and the case is sent back to the trial Magistrate to be dealt with according to law, in the light of this judgment.

K.S.

Appeal allowed.

THE SUPREME COURT OF INDIA.

(Criminal Appellate Jurisdiction.)

PRESENT :—K. SUBBA RAO, RAGHUBAR DAYAL AND J. R. MUDHOLKAR, JJ.

Shiv Prasad Chuni Lal Jain and another

.. *Appellants**

v.

The State of Maharashtra

.. *Respondent.*

Penal Code (XLV of 1860), section 34—Applicability—Requirements of.

For the applicability of section 34 of the Indian Penal Code against an accused, it is necessary that that accused had actually participated in the commission of the crime either by doing something which forms part of the criminal act or by at least doing something which would indicate that he was a participant in the commission of that criminal act at the time it was committed.

Where accused No. 1 alone did the various acts which constituted the offence of which he was convicted (sections 471 and 467, Penal Code) and accused Nos. 2 and 3 took no part in the actual commission of those acts they cannot be said to have participated in the commission of the criminal act which amounted to the various offences. Whatever they might have done prior to the doing of those acts did not form an ingredient of the offence committed by accused No. 1. Accused Nos. 2 and 3 in the instant case cannot therefore be held liable, by virtue of section 34, Penal Code for the acts committed by accused No. 1 alone, even if those acts had been committed in furtherance of the common intention of the three accused.

Barendra Kumar Ghosh v. King-Emperor, L.R. 52 I.A. 40 : 48 M.L.J. 543 ; *Shreekanth Ramayya Munnipalli v. The State of Bombay*, (1955) 1 S.C.R. 1117 : (1955) S.C.J. 233 and *Jaikrishnadass Manohardas Desai v. The State of Bombay*, (1960) 3 S.C.R. 319, considered.

But they may be liable on the alternative offences of abetment being made out against them.

Appeals by Special Leave from the Judgment and Order dated the 19th June, 1961, of the former Bombay High Court in Criminal Appeals Nos. 218 and 242 of 1961, respectively.

S. Mohan Kumaramangalam, Senior Advocate (*R. K. Garg* and *M. K. Ramamurthi* Advocates of *M/s. Ramamurthi & Co.*, Advocates, with him), for Appellant (In CrI. A. No. 150 of 1961).

B. M. Mistry, Advocate, and *Ravinder Narain* and *J. B. Dadachanji*, Advocates of *M/s. J. B. Dadachanji & Co.*, Advocates, for Appellant (In CrI. A. No. 185 of 1961).

B. K. Khanna, *B. R. G. K. Achar* and *R. H. Dhebar*, Advocates, for Respondent (In both the Appeals).

The Judgment of the Court was delivered by

Raghubar Dayal, J.—*Shiv Prasad Chunilal Jain*, appellant in Criminal Appeal No. 150 of 1961 was accused No. 3 and *Pyarelal Ishwardas Kapoor*, appellant in Criminal Appeal No. 185 of 1961 was accused No. 2, at the Sessions Trial before the Additional Sessions Judge, Greater Bombay. Along with them was a third accused, *Rameshwarnath Brijmohan Shukla* who was accused No. 1 at the trial.

As the two appeals arise from a common judgment, we would dispose of them by one judgment. The appellants would be referred to as accused No. 3 and accused No. 2 respectively.

The facts leading to the conviction of the appellants are that a large quantity of iron angles was consigned early in February, 1959 from *Gobind Garh* to *Rayapuram* under Railway Receipt No. 597481. They were despatched in an open wagon bearing E.R. No. 69667. The labels of the wagon were changed at *Itarsi* railway station and it was diverted to *Wadi Bunder* under a label showing that the iron angles had been despatched from *Baran* to *Wadi Bunder* under Railway Receipt No. 43352 dated 6th February, 1959. This wagon reached *Wadi Bunder* on 16th February, 1959. On 17th February, it was unloaded by *Baburao Gawade*, P.W. 1 and *Shridhar*, P.W. 14. On 18th February, accused No. 1 obtained the delivery sheet of the bill and signed it in the name of *Shri Datta*. He also obtained delivery of the iron angles from the railway and signed the Railway Delivery Book in the name of *Shri Datta*. The railway authorities delivered these on the presentation of the forged receipt No. 43352 and on payment of the charges amounting to Rs. 1,500.

These iron angles were then transported to the godown of the National Transport Company at *Sewri* and stored there. The entries in the book showed their receipt in the account of accused No. 3 and also contained a further entry indicating the goods to be received in the account of accused No. 2. The latter entry was made on the receipt of a chit, Exhibit Z-8, from accused No. 1 saying that the goods be entered in the name of accused No. 2. On 24th February, 1959, the accused No. 2 signed an application, Exhibit K, addressed to the head office of the National Transport Company for delivering the goods. Accused No. 1 obtained the goods from the godown of that company on 26th February and 3rd March, 1959.

A complaint by the original consignee about the non-receipt of the iron angles sent from *Gobind Garh* led to an enquiry and eventual prosecution of the three accused.

Six charges were framed. The first charge was against all the accused for an offence punishable under sections 471 and 467 read with section 34, Indian Penal Code and stated that in furtherance of their common intention to cheat the railway administration, accused No. 1 had fraudulently or dishonestly used the forged Railway Receipt No. 43352.

The second charge was framed in the alternative. Firstly it charged all the accused for an offence under section 467 read with section 34, Indian Penal Code on account of accused No. 1 having forged the bill portion. In the alternative, accused No. 1 was charged with the offence under section 467, Indian Penal Code and the other accused Nos. 2 and 3 were charged under section 467 read with section 109, Indian Penal Code for having abetted accused No. 1 in the commission of that offence.

Charges Nos. 3 to 6 were similarly framed in the alternative, i.e. in the first instance all the three accused were charged of certain offences read with section 34, Indian Penal Code while in the alternative accused No. 1 was charged of the specific offence and the other two accused were charged with that offence read with section 109, Indian Penal Code.

The accused were tried by the Additional Sessions Judge, Greater Bombay, with the aid of a jury. The jury returned a unanimous verdict of guilty against all the accused for the various offences read with section 34, Indian Penal Code. The verdict of the jury was not recorded with respect to the five alternative charges against accused No. 1 regarding substantive offences and against accused Nos. 2 and 3 with respect to the various offences read with section 109, Indian Penal Code. The Sessions Judge accepted the verdict of the jury and convicted them of the various offences read with section 34, Indian Penal Code. Their appeals to the High Court were unsuccessful and therefore accused Nos. 2 and 3 have preferred these appeals after obtaining Special Leave from this Court.

The main contention for the appellants is that the learned Sessions Judge misdirected the jury with respect to the requirements for section 34, Indian Penal Code. The contention is that the various offences were actually committed by accused No. 1 on 18th February, that neither accused No. 2 nor accused No. 3 was present when he presented the forged Railway Receipt, did other criminal acts and took delivery of the iron angles and that therefore even if they had agreed with accused No. 1 for the cheating of the railway administration by obtaining the iron angles dishonestly by presenting the forged receipt, they might have abetted the commission of the various offences, but could not be guilty of those offences with the aid of section 34, Indian Penal Code, whose provisions, it is contended, do not apply in the circumstances of the case. It is contended that for the applicability of section 34 against an accused, it is necessary that that accused had actually participated in the commission of the crime either by doing something which forms part of the criminal act or by at least doing something which would indicate that he was a participant in the commission of that criminal act at the time it was committed. Reliance is placed on the cases reported as *Barendra Kumar Ghosh v. The King-Emperor*¹ and *Shreekantiah Ramayya Munnipalli v. The State of Bombay*².

The learned Sessions Judge in the instant case had told the jury :

"In case you come to the conclusion that there was a common intention in the minds of all the three accused and accused No. 1 was acting in furtherance of that common intention, all the accused would be answerable for the offences proved against accused No. 1 by virtue of the provisions of section 34 of the Indian Penal Code, and it would be no answer to the charge to say that the acts were done by accused No. 1 alone. Therefore, you have first, to consider for yourselves what offences are proved against accused No. 1. You have next to ask yourselves whether it is proved (and it can also be proved by circumstantial evidence) that there was a common intention in the minds of all the three accused and the acts done by accused No. 1 were done in furtherance of that common intention. If your answer is 'yes' all the three accused would be guilty of the charges proved against accused No. 1 by virtue of section 34 of the Indian Penal Code."

It is contended that in thus putting the case to the jury the learned Sessions Judge was in error as he did not take into consideration the fact that accused Nos. 2 and 3 were not present at all at the time when the various offences were actually committed by accused No. 1. The two cases relied upon by the appellants support their contention.

In *Shreekantiah's case*², three persons were convicted on several charges under section 409 read with section 34, Indian Penal Code, for committing criminal breach of trust of certain goods entrusted to them as Government servants in charge of the Stores Depot at Dehu Road near Poona. The stores had illegally passed out of the Depot and were handed over to a person who was not authorised to get them from the Depot. It was alleged that those accused had conspired to defraud the Government of those properties and that it was in pursuance of that conspiracy that they had arranged to sell the goods to the other person. Accused No. 1 in that case

was not present when the goods were loaded nor was he present when they were allowed to pass out of the gates, that is to say, he was not present when the offence was committed. Bose, J., delivering the judgment of the Court, said at page 1189 :

"If he was not present, he cannot be convicted with the aid of section 34. He could have been convicted of the abetment had the jury returned a verdict to that effect because there is evidence of abetment and the charge about abetment is right in law. But the jury ignored the abetment part of the charge and we have no means of knowing whether they believed this part of the evidence or not."

In considering the misdirection in the charge to the jury and the requirements of section 34, Indian Penal Code, the learned Judge said at page 1188:

"The essence of the misdirection consists in his direction to the jury that even though a person 'may not be present when the offence is actually committed' and even if he remains 'behind the screen, he can be convicted under section 34 provided it is proved that the offence was committed in furtherance of the common intention. This is wrong, for it is the essence of the section that the person must be physically present at the actual commission of the crime."

*Shreekantiah's case*¹ is practically similar to the present case. Both accused No. 2 and accused No. 3 deny their presence at the railway station on 18th February, when the various offences were committed. None deposed that accused No. 3 was then present. The presence of accused No. 2 was, however stated by Babu Rao Gawade, P.W. 1. He had not stated so in his statement before the police during investigation and the summing up by the learned Sessions Judge was that, under those circumstances, it was for the jury to consider whether to believe the statement of the witness in Court or not. It cannot be said as there was other evidence against accused No. 2 as well about his connections with this criminal transaction whether the jury believed his presence at the railway station on 18th February or not.

In *JaiKrishnadas Manohardas Desai v. The State of Bombay*², *Shreekantiah's case*¹, came up for consideration and was distinguished, on facts. In that case, the two accused, who were directors of a company, were convicted of an offence under section 409 read with section 34, Indian Penal Code for committing criminal breach of trust with respect to certain cloth supplied to them. It was alleged that one of the accused was not working at that factory during the period when the goods must have been removed and that therefore he could not be made liable for the misappropriation of the goods by taking recourse to the provisions of section 34, Indian Penal Code. Shah, J., delivering the judgment of the Court, said at page 326 :

"But the essence of liability under section 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offender sought to be rendered liable under section 34 is not, on the words of the statute, one of the conditions of its applicability. A common intention—a meeting of minds—to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of section 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places. In *Shreekantiah's case*¹, misappropriation was committed by removing the goods from a Government Depot and on the occasion of the removal of the goods, the first accused was not present. It was therefore doubtful whether he had participated in the commission of the offence, and this Court in those circumstances held that participation by the first accused was not established. The observations in *Shreekantiah's case*¹ in so far as they deal with section 34 of the Indian Penal Code must, in our judgment be read in the light of the facts established and are not intended to lay down a principle of universal application."

Accused No. 1, in the present case, alone did the various acts on 18th February, 1959, which constituted the offences of which he was convicted. Accused Nos. 2 and 3 took no part in the actual commission of those acts. Whatever they might have done prior to the doing of those acts, did not form an ingredient of the offences committed by accused No. 1. They cannot be said to have participated in the commission of the criminal act which amounted to those various offences. They cannot be therefore held liable, by virtue of section 34, Indian Penal Code, for the acts committed by accused No. 1 alone, even if those acts had been committed in furtherance of the common intention of all the three accused. The result, therefore,

1. (1955) S.C.R. 1177 : (1955) S.C.J. 233 : A.I.R. 1955 S.C. 287.

2. (1961) 1 S.C.J. 42 : 1961 M.L.J. (Cr.) 28 : (1960) 3 S.C.R. 319 : A.I.R. 1960 S.C. 889.

is that the conviction of the appellants, viz., accused Nos. 2 and 3, for the various offences read with section 34, Indian Penal Code is to be set aside.

We did not hear, at first, the learned Counsel for the appellants, on the alternative offences of abetment being made out against the appellants and with respect to which the verdict of the jury was not recorded by the Sessions Judge. We did not consider it necessary to remit the case for further proceedings with respect to those charges and preferred to dispose of the case finally after giving a further hearing to the learned Counsel for the appellants. We accordingly heard them on the charges relating to the appellants abetting accused No. 1 in the commission of the various offences, subject-matter of charges Nos. 2 to 6 and now deal with that matter.

We need not discuss the evidence on the record and would just note the various facts which are established from the evidence or which are admitted by the accused.

The relevant facts having a bearing on the question of accused No. 2 abetting the commission of the offences committed by accused No. 1 are :

1. Accused No. 1 is the servant of accused No. 3 at whose shop accused No. 2, who is a broker, sits.

2. Accused No. 2 deals in non-ferrous goods.

3. Accused No. 2 went with Baburam Gavade, P.W. 1 a clearing agent, on 17th February, 1959, to see the goods.

4. The godown register showed the angle irons to be received in the account of Shiv Prasad Bimal Kumar and Pyare Lal, accused No. 2.

5. Accused No. 2 wrote the letter Exhibit K to the National Transport Company for issuing the delivery order with respect to the angle irons in order to enable him to take delivery thereof.

6. Accused No. 2 was in possession of the note Exhibit Z-7 which he delivered to the police during the investigation.

The relevant facts having a bearing on the alleged abetment of the offences by accused No. 3 are :

1. Accused No. 1 is an employee of accused No. 3.

2. The angle irons were stored at the Depot of the National Transport Company at the instance of accused No. 1.

3. The books of the godown noted their receipt in the account of accused No. 3, though the account showed further that they were received in the account of accused No. 2. This further entry was made on receipt of Exhibit Z-8 from accused No. 1 when the last lot was delivered at the godown on 18th February.

4. The entire writing on Exhibit Z-7 except the signature of an unknown person and the date below it, was written by accused No. 3. That document reads:

"To

Piarayalal, C/o M/s. Sheopershad Bhimal Kumar, Bombay.

1. R.R. No. 43351 dt. 4-2-59. Ashoknagar to Carnac Bridge

2. R.R. No. 43352 dt. 6-2-59. Baran to Wadi Bunder.

I have received the material of the above R.R. which I have handed over to you for clearance.

(Sd.) Yashwant.....
24-2-59."

Besides these circumstances, it is urged for the State that the effect of the diversion of the wagon from its right course at Itarsi railway station indicates that the people responsible for it must have a fairly large and influential organization with funds and that such a diversion could not have been merely at the instance of accused No. 1, an employee of accused No. 3, who is a substantial merchant. About Rs. 1,500 were paid as charges to the railway authorities before the angle irons could be taken delivery of. Accused No. 1 could not have been in a position to make that payment.

that the goods were stored on behalf of Pyare Lal and noted in it that they were stored on behalf and under lien to Sheopershad Bimal Kumar.

It is further urged that accused No. 1 would not have stored the goods with the National Transport Company unless the storage was on account of his master, accused No. 3.

Accused No. 2 admits his going to see the goods on 17th February, but states that he lost his interest in the goods as they were iron angles and his line of business was in non-ferrous goods. He explains his signing the letter Exhibit K by saying that he did so at the instance of accused No. 3 who represented to him that accused No. 1 had, by mistake, stored the goods in the name of accused No. 2 and of accused No. 3 showing him the document Exhibit Z-7 which he retained with himself.

Accused No. 3 states that he had nothing to do with this matter and that he wrote Exhibit Z-7 at the instance of accused No. 2, who asked him to do so, he himself being unable to write in English or Hindi.

We now discuss the evidence to determine whether the accused Nos. 2 and 3 abetted the commission of the offences committed by accused No. 1.

Exhibit Z-7, as originally written, does not appear to have had the first lines, viz., the writing of 'To Piarayalal, C/o.' This was written subsequently. This is clear, as urged for accused No. 2 from the facts that it appears to have been written with a different pen and, possibly, with different ink also, and because the word 'C/o' has been written at an unusual place. In ordinary writing, it should have been in line with the latter expression 'M/s. Sheopershad Bimal Kumar'. It follows therefore that this document was first written by accused No. 3 to show that a third person had entrusted him with the Railway Receipt No. 43352 dated 6th February, 1959, and that that person had received the material to which the Railway Receipt related. In this original form, the only conclusion possible from the original contents of the document can be that M/s. Sheopershad Bimal Kumar, of which accused No. 3 is the proprietor, received this receipt from the third person in order to clear the goods from the railways. This would amply explain accused No. 1 taking delivery of the goods on 18th February and storing them with the National Transport Company in the account of accused No. 3 and the entries in the Godown Register.

Himmatlal, P.W. 13, is the Godown-keeper. He issued the receipt Exhibit P-1 which records:

"We have today received the under-mentioned goods for storage with us in our godown No. IPL on behalf of and under lien to Shiv Prasad Bimal Kumar."

This is a clear indication of the fact that the goods were stored on behalf of Sheopershad Bimal Kumar, i.e., accused No. 3. The words 'under lien', are of great significance in this respect and show that the storage was not shown to be on behalf of accused No. 3 merely because the angle irons were sent by accused No. 1 who was an employee of accused No. 3. The expression 'under lien' points to there being some specified transaction between accused No. 3 and the National Transport Company for the storing of the articles. This note further confirms the statement of Himmatlal that he had at first written in the accounts that the goods were received on account of Sheopershad Bimal Kumar and that it was on receipt of Exhibit Z-8 from accused No. 1 that he noted the words "Account Pyare Lal" in the entries with respect to those goods.

The circumstance that accused No. 3 was in a better position to finance the transaction than accused No. 1, is also consistent with the aforesaid conclusion from the original contents of Exhibit Z-7.

Apart from the apparent later noting of the first line in this document, Exhibit Z-7, there appears no good reason why the receipt should have been written in this form if it was to be written at the instance of accused No. 2. There was no reason to give the address of Pyare Lal as C/o M/s. Sheopershad Bimal Kumar. The later entry in this document must have been therefore for a purpose and that could have only been to show that the Railway Receipt No. 43352 was dealt with by accused No. 2 and not by accused No. 3.

Mention may be made here of the fact that certain witnesses who had, during their police statements, referred to certain actions of accused No. 3, stated in Court that those acts were committed by accused No. 2. No reliance can be placed on any of the statements of those witnesses and this fact is just mentioned to show that it fits in with the very first attempt in converting the document originally prepared to show that accused No. 3 had dealt with this forged Railway Receipt into a document showing that it was not accused No. 3 but accused No. 2 who dealt with that receipt.

Accused No. 2 has been acting as a broker. He signed Exhibit K. He must be conversant with the language in which he signed. It was not necessary that the receipt Exhibit Z-7 should have been written in English or in Hindi even if accused No. 2 did not know any of those languages.

We are therefore not prepared to accept the explanation of accused No. 3 with respect to his recording the document Exhibit Z-7. We hold, as admitted by him, that he had written this document. It makes reference to the forged receipt of which advantage was taken in getting delivery of the iron angles. Accused No. 3, writing such a receipt, clearly points to his being concerned with the taking delivery of the iron angles, by accused No. 1, his employee. Once the forged receipt is traced to accused No. 3, from his own writing, the natural conclusion is that it was he who passed it on to his employee accused No. 1 for the purpose of getting delivery of those goods from the railway authorities. He thus aided accused No. 1 in obtaining delivery of those goods, and in his committing the various offences for achieving that object. The further fact that the receipt was endorsed in the name of Datta and not in the name of accused No. 1 also proves that accused No. 3 must have known that the receipt he was dealing with was not a genuine receipt for the goods which were to be taken delivery of. If he had believed the receipt to be a genuine one, he would have endorsed it or got it endorsed in the true name of his employee. His employee too would not have taken delivery under a false name. We are, therefore, of opinion that it is established from these various circumstances and facts that accused No. 3 had abetted the commission of the offences, the subject-matter of charges Nos. 2 to 6, by accused No. 1.

The points in favour of accused No. 2 are that he does not deal in non-ferrous metals and therefore he would not have taken any interest in the transaction after he had found out on 17th February, that the goods were ferrous and not non-ferrous. The fact that the goods were not stored in his name in the accounts of the godown of the National Transport Company, but were stored in the first instance in the name of accused No. 3, also goes in his favour. If accused No. 3, had nothing to do with it and accused No. 1 was simply acting for accused No. 2, he would have sent instructions in the very first instance to Himmatlal that goods were to be stored in the account of accused No. 2. He did not do so. He sent intimation for storing the goods in the name of Pyarelal with the last lorry transporting the iron angles to the godown. Pyarelal had no previous dealings with the National Transport Company.

In this connection, the exact direction given by accused No. 1 is of some significance. The direction given by him in Exhibit Z-8 was 'Please give a receipt in the name of a/c Pyare Lal'. The request was not that the goods were of Pyare Lal and so be stored on his account. That should have been the natural direction. The receipt would have then been issued in the name of Pyare Lal and of nobody else. The direction given by accused No. 1 therefore indicates that for certain purposes he desired the receipt alone to be in the name of Pyare Lal. Naturally, Himmatlal had to make some entry in the books of the godown which would be consistent with a receipt issued in the name of Pyare Lal. Himmatlal therefore noted the words 'account Pyare Lal', below the original note 'account Sheopershad Bimal Kumar,' but saw no reason to make a statement in the receipt Exhibit P that the goods were stored on behalf of Pyare Lal and noted in it that they were stored on behalf and under lien to Sheopershad Bimal Kumar.

Accused No. 2 signed the letter Exhibit K for the issue of the delivery order. His explanation is that he did so when accused No. 3 insisted and told him that his employee had by mistake stored the goods in his name. Ordinarily, this should not have been believed by accused No. 2 as there was no reason why accused No. 1 should store the goods in his name by mistake. He could have and might have suspected something not straight but could shake off such suspicion by his being shown the receipt Exhibit Z-7, which showed that the goods had been cleared by A-3 on behalf of certain person who had passed on that receipt. He was under an obligation to accused No. 3 and it is possible that he could not have strongly resisted the request of accused No. 3 to sign the letter Exhibit K. Accused No. 3 had necessarily to obtain a letter signed by Pyare Lal when the goods had not been shown to be stored in his account but were noted in the account of Pyare Lal, or of both Sheopershad Bimal Kumar and Pyare Lal.

It is significant that accused No. 2 himself did not go to take delivery of the goods. It was accused No. 1 who took the delivery in two lots and each time signed the receipt in the name of Pyare Lal.

If accused No. 2 was also a party to the dishonest obtaining of the goods from the railway, there would not have been any occasion for such duplication of names on whose behalf the goods were stored with the National Transport Company or for such a document as Exhibit Z-7 coming into existence or for accused No. 2 keeping the document with himself. He kept it with himself for his protection and produced it for that purpose during investigation. It may be that when accused No. 3 tried to dispel his doubts when he was requested to sign the letter Exhibit K, accused No. 2 himself suggested the receipt Exhibit Z-7 to be addressed in his name, as only then that receipt could be of any help to him. In these circumstances, we are of opinion that the complicity of accused No. 2 in the commission of the various offences by accused No. 1 is not established beyond reasonable doubt.

We therefore allow the appeal of Pyare Lal and acquit him of the offences he was convicted of. We dismiss the appeal of accused No. 3, Shiv Prasad Chunilal Jain, but alter his conviction for the various offences read with section 34, Indian Penal Code to those offences read with section 109, Indian Penal Code, and maintain the sentences.

K.S.

*Appeal of accused No. 2 allowed and
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Accused No. 2 signed the letter Exhibit K for the issue of the delivery order. His explanation is that he did so when accused No. 3 insisted and told him that his employee had by mistake stored the goods in his name. Ordinarily, this should not have been believed by accused No. 2 as there was no reason why accused No. 1 should store the goods in his name by mistake. He could have and might have suspected something not straight but could shake off such suspicion by his being shown the receipt Exhibit Z-7, which showed that the goods had been cleared by A-3 on behalf of certain person who had passed on that receipt. He was under an obligation to accused No. 3 and it is possible that he could not have strongly resisted the request of accused No. 3 to sign the letter Exhibit K. Accused No. 3 had necessarily to obtain a letter signed by Pyare Lal when the goods had not been shown to be stored in his account but were noted in the account of Pyare Lal, or of both Sheopershad Bimal Kumar and Pyare Lal.

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